

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

75-1073

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
PJS

-----X
UNITED STATES OF AMERICA,

Appellee,

against

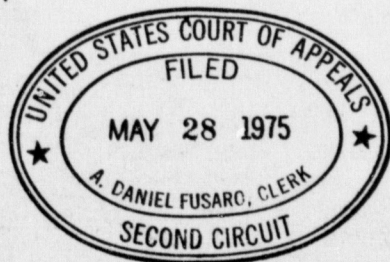
EDUARDO BERMUDEZ, JORGE VIVAS and
ISPAEL DIAZ-MARTINEZ,

Appellants.
-----X

BRIEF AND APPENDIX OF APPELLANT

JORGE VIVAS

THOMAS R. MATAKAZZO
Attorney for Appellant, Vivas
220 Court Street
Brooklyn, New York 11201
212- UL 8-7082



FILED
MAY 28 11 54 AM '75
EASTERN DISTRICT
OF NEW YORK
P. Gammone

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellee,

against

EDUARDO BERMUDEZ, JORGE VIVAS and
ISRAEL DIAZ-MARTINEZ,

Appellants.
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JORGE VIVAS

THOMAS R. MATARAZZO
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BRIEF OF APPELLANT VIVAS

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA,

Appellee,

-against-

EDUARDO BERMUDEZ, JORGE VIVAS and
ISRAEL DIAZ-MARTINEZ,

Appellants.

-----X

STATEMENT AND FACTS

The defendant, Jorge Vivas, was indicted in the United States District Court for the Eastern District of New York under indictment number 74 Cr. 403, which was filed in that Court Clerk's Office on May 30, 1974 (A-9), alleging two counts which were recited at Count One and Count Six of that indictment.

Count One of the indictment alleged:

On or about between the 31st day of October, 1973, and the 1st day of May, 1974, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants EDUARDO BERMUDEZ, JORGE VIVAS also known as Jorge Posos, ISRAEL DIAZ-MARTINEZ, MANUEL FIFFE also known as "Pfiefel", VICTOR BLANCO also known as "Red", and LUIS FELIPE MIRANDA, together with Juanita Diaz also known as "Jenny", herein named as a co-conspirator but not as a defendant, and others, did knowingly and intentionally conspire to violate Section 841(a)(1) of Title 21, United States Code.

1. It was a part of said conspiracy that the defendants and co-conspirators would knowingly and intentionally distribute and possess with intent to distribute cocaine hydrochloride, a Schedule II narcotic drug controlled substance.

2. It was further a part of said conspiracy that the defendants and co-conspirators would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities. (Title 21, United States Code Section 846).

Count Six of the indictment alleged:

On or about the 20th day of November, 1973, within the Eastern District of New York, the defendants EDUARDO BERMUDEZ, JORGE VIVAS, also known as Jorge Posos, MANUEL FIFFE, also known as "Pfiefel" and VICTOR BLANCO, also known as "Red" did knowingly and intentionally possess with intent to distribute approximately 1/2 kilogram of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21 United States Code, Section 841(a)(1) and Title 18 United States Code Section 2).

Trial was held before Chief Judge Jacob Mishler and a jury on October 15, 16, 17, 18, 22, 23, 24, 25 and 26, 1974. On October 26, 1974 the jury returned a verdict against defendant Vivas of guilty as to Count One, the conspiracy count, and not guilty as to Count Six, the substantive count.

POINT I

Count One of the Indictment
is insufficient on its face.

Count One, the conspiracy count of this indictment,
is insufficient on its face. Rule 7, F. R. Cr. Proc.

The defendants moved to dismiss the indictment before
trial on a bail reduction motion and at the trial (October
5, 1974, 22A-32A), the trial court denied the motion (October
15, 1974, A).

The indictment must allege facts including an overt
act which the Government must prove at trial.

United States v. Torres,
503 F. 2d 1120, 1125 (2 Cir. 1975).

The indictment does not allege any overt act and must
be dismissed.

POINT II

There was no evidence upon which to indict defendant Vivas on the conspiracy count.

It should be noted here that on a motion to discuss the indictment for its failure to allege facts including a failure to charge an overt act under the conspiracy count (October 15, 1974) (22A) the Government asserted that the overt act upon which the conspiracy indictment was based was the substantive count, (Count Six) (October 15, 1974, 23A). The Government asserted that the "substantive count act on November 20, 1973; that that was an act in furtherance of the conspiracy; that we assumed that the defendant had met with his co-conspirators at some prior date, so that the substantive act that occurred on November 20th would be forthcoming." (October 15, 1974, 25A) (Underscoring added). Jorge Vivas, however, had not given any testimony before the grand jury.

The conspiracy count of the indictment was not based on any testimony whatever but on an assumption by the Government. There was

"no substantial or rationally persuasive evidence upon which to base its indictment."

POINT III

The introduction by the Government of testimony of; and the physical display of evidence of a subsequent crime by defendant, VIVAS; an untried and unproven crime which took place after the alleged conspiracy was over; and which crime was neither mentioned, included or set forth in the indictment; is so highly prejudicial and so destroyed the right of the defendant, VIVAS; (who never took the stand) to a fair trial, that the conviction should be reversed.

Count 1 of the indictment charges a conspiracy by the defendant, VIVAS, et als between October 31, 1973 and May 1, 1974.

Count 6 of the indictment charges a possession with intent to distribute 1/2 kilograms of cocaine hydrochloride by defendant, VIVAS, et als on the 20th day of November, 1973.

The jury acquitted the defendant, VIVAS, of the possession, with intent to distribute cocaine on the 20th of November, 1973. This leaves open the question of conspiracy as charged in Count 1 of the indictment and the testimony of every witness produced at the trial shows that defendant, VIVAS, was not part of and had no dealings with any person mentioned, including any government agents except on November 20th, 1973 and not before.

Special agent Abbott met with Blanco at 4:30 P.M. on October 31st, 1973 (Pg 224 of transcript).

Special agent Abbott again met Victor Blanco on November 2nd, 1973 at which time he met one, Manuel Fiffe, who gave him a package wrapped in brown paper containing a plastic bag with white powder which was, according to Abbott, low quality cocaine. (pgs. 231-232 of transcript.)

Special agent Abbott, Fiffe and Blanco arranged for the purchase of one ounce of cocaine at an agreed \$675.00 (pg.238 of transcript) and agent Abbott paid Fiffe the sum of \$675.00 for the alleged cocaine (pg. 243 of transcript.)

Special agent, Abbott, again speaks with Blanco on November 8th, 1973 concerning a shipment (pg. 249 of transcript) 250-251.

Special agent Abbott and Blanco call at store at 293 Grand Street (Pg 253-4 of transcript) and inspect and discuss price of cocaine as per sample exhibited by Fiffe - November 12th, 1973.

Special agent Abbott purchased four and one half ounces of cocaine from Fiffe and Blanco for \$2900.00 (pg.283 of transcript through 286.)

On November 20th, 1973 Abbott states Vivas was in store with Fiffe, Blanco, Agent Abbott and Bermudez (pg 302 transcript).

On November 20th, 1973 agent Abbott states Vivas wanted \$12,000.00 for what he, Abbott said was 1/2 Kilo of cocaine (pg. 345 of transcript).

On November 23rd, 1973 agent Abbott again saw Blanco and tried to arrange meeting with Bermudez (pg. 365).

On the 26th of November, 1973, agent Abbott met with Blanco (pg. 366).

Special agent Abbott states he never saw, heard from, heard of, or had any dealings with Vivas before November 20th, 1973 (pg. 452 through 471).

On October 15th, 1974, the Government stated that it intended to introduce evidence seized at the home of defendant, Vivas. Objection was made to the introduction of any of the articles seized as irrelevant and prejudicial to defendant, Vivas (pg.16A through 21A).

On October 21st, 1974, over the objection of counsel, the Government was allowed to introduce and offer testimony of the seizure in defendant, Vivas' home of a sealed plastic container with traces of cocaine, a vial with a cocaine spool, 2 containers of Boric Acid which agent Greenan stated on pg. 1004-1005 was to be used to make a larger volume of cocaine, a heat sealer which agent Greenan stated is used to seal plastic bags in cocaine business, pg. 1009; a scale which agent Greenan stated is used in cocaine business and six large bags of lactose, pg. 1014, which agent Greenan says is used in cutting cocaine. All this testimony given to the jury over counsel's objection and then placed on The Government Counsel table, not four feet from the jury to the end of the trial and up to the verdict.

The Court on October 21st, 1974 refused to allow counsel to introduce evidence evidence to show the jury that defendant, Vivas, was only charged with the possession of the exhibited articles; that his guilt was not even proven; that the alleged possession was after the conspiracy had ended and was not a part thereof, pgs. 1015 through 1021.

When the Court allowed the Government to introduce into evidence and then exhibit an imposing array of material and articles together with statements by the Government expert witness agent Greenan; that they are all used in the cocaine business, and these articles are then permitted to be laid out on the Government Counsel table in all their massive, eye-catching bulk; not four feet from the jury to the end of the trial, then this is such prejudicial error and so damaging an attack on the credibility of a defendant who did not take the stand, that he cannot be said to

have received a fair trial. Defendant, Vivas, was not convicted of a conspiracy, he was convicted and found guilty of possessing 6 bags of lactose, 2 containers of boric acid, a scale, a heat sealer, a trace of cocaine and a vial with a cocaine spoon. This was not part of the conspiracy. The conspiracy was over long before June 14th, 1974, and the Court so stated, pg. 993. The value judgment made by the Court in allowing this evidence into the trial with its subsequent exhibit was gravely prejudicial and rendered the trial of the defendant, Vivas as well as Bermudez and Martinez, fundamentally unjust. There is no connection between this offense and the offense charged in the indictment. The Jury found the defendant, Vivas, not guilty of Count 6 of the indictment. Therefore, it must follow that the only period remaining in which defendant, Vivas, would be part of a conspiracy would have to be prior to November 20th, 1973, a period during which no one implicates defendant, Vivas, in any way, shape, form or manner, not agent Abbott, not any other government agent, or any witness produced by the government. No one states defendant, Vivas, had part in any transaction, dealing or conspiracy. How then does it follow that he is found guilty when the jury deliberated at length? Only because of the inference that anyone with so much lactose, boric acid, heat sealer, scale and his own cocaine obtained by a later search warrant must be in the cocaine business and part of any conspiracy. The jury was not advised and the Court refused to permit counsel to bring to their attention that the defendant, Vivas, was facing trial and had not been found guilty of the possession of those articles. In effect, that array of evidence fairly screamed at the jury that Vivas must be a dealer in cocaine and part of a conspiracy.

Without the introduction of this irrelevant but highly and prejudicial testimony and the placing before the jury of the imposing array of 6 large plastic bags of lactose, 2 containers of boric acid, a postal scale, a heat sealer, a sealed container with traces of cocaine, a vial with a cocaine spoon; all patiently explained to the jury over counsel's objection, to be used in explaining and cutting cocaine in the cocaine business; there would not have been a conviction of the defendant, Vivas.

The jury was dazzled by this exhibit, and no layman could erase it from his mind or visual memory in their deliberations. The conviction should be reversed.

The Appellant on the pages following this page, submits to this Court cited cases heard in the United States Federal Court system in support of Appellant's argument that the introduction of evidence gathered on June 14th, 1974 after the conspiracy had terminated was illegal and prejudicial.

In McCarthy The Court held that: " Evidence of Collateral crime unconnected and unrelated to offense charged is inadmissible; such evidence is irrelevant prejudicial since it ordinarily does not tend to establish the commission by accused of offense charged and its tendency to prejudice the trier of fact outweighs its probative value." United States v. McCarthy 470 F. 2d 222, 223 (6th Circuit) 1972.

1. The rule of McCarthy has been adopted and approved in numerous Circuits and Cases, United States v. Stephens 492 F. 2d 1367, 1379 (1974).

In the Harris case, The Court of the 4th Circuit held that: "...it is inconsistent with traditional concept of fair trial to permit introduction of any evidence which might influence jury to convict defendant for any reason other than his guilt of specific offense with which he is charged." United States v. Harris 331 F.2d 185 (4th Circuit) 1964, at p. 187.

In the Osborne case, The Court of the 8th Circuit held that: "The general rule, subject to certain exceptions not here applicable, is that placing before the jury evidence of other crimes committed by the defendant constitutes prejudicial error. Marshall v. United States, 360 U.S. 310, 79 S. Ct. 1171; Kraft v. United States, 8 Cir., 238 F.2d 794, 801-802; Kempe v. United States, 8 Cir., 151 F.2d 680,697; Thurman v. United States, 9 Cir. 316 F.2d 205; United States v. Kum Seng Seo, 3 Cir., 300 F.2d 623, 625.

In Michelson v. United States, 335 U.S. 469, 475, 69 S. Ct.

213, 218, 93 L.Ed. 168, the Court holds: "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt." Osborne v. United States 351 F.2d 111, 1965 at p. 117.

In the Kempe case The Court of the 8th Circuit held that: "The general rule is that in a criminal prosecution proof which shows or tends to show that the accused is guilty of the commission of other crimes and offenses at other times, even though they are of the same nature as the one charged in the indictment, is incompetent and inadmissible for the purpose of showing the commission of the particular crime charged. The accused is to be convicted, if at all, on evidence showing his guilt of the particular offense charged in the information. It is not competent to prove that the accused committed other crimes of a like nature for the purpose of showing that he would be likely to commit the crime charged in the information. Evidence of other crimes compels a defendant to meet charges of which the information or indictment gives no information or indictment gives no information, confuses him in his defense and raises a variety of false issues. Thus, the attention of the jury is diverted from the charge contained in the indictment or information." Kempe v. United States 151 F.2d 680 1945, at p. 687.

The rule of Kempe has been adopted in KRAFT v. United States of America 238 F.2d 794, 801 802 1956.

In the case of Modern Reed & Rattan Co., Inc. The Court held that: "They were charged with specific violations of the statute and were entitled to be tried only for those offenses and upon nothing but

competent evidence. Boyd v. United States, 142 U.S. 450, 12 S. Ct. 292, 35 L.Ed. 1077. The general rule applicable to them is that evidence of the commission of a wholly separate and independent crime even though of the same nature is not admissible. Kempe v. United States, 8 Cir., 151 F.2d 680; Fabacher v. United States, 5 Cir., 20 F.2d 736. Sound policy in the administration of the criminal law underlies this well established principle and little is to be gained by pointing out that its exclusion can hardly be justified on the ground of irrelevancy. Nor should we fail to notice a plain error so far reaching because no objection was taken." United States v. Modern Reed & Rattan Co., Inc., et al 159 F.2d 656, 658 (2d Circuit) 1947.

In the case of John T. Goodwin, The Court held that: "The federal courts have established as a "universal rule" the wise principle that "evidence of the commission of a wholly separate and independent crime is not admissible as a part of the case against the defendant." 2 C. Wright, Federal Practice and Procedure, Criminal section 410, at 123. The reason for the rule is, of course, that an accused's guilt or innocence as to a particular crime should be determined solely on the basis of evidence relevant to that crime; a jury should not be permitted to convict an accused because it believes him to be a person of bad character or because of a notion that, since he committed some other similar crime, he must also have committed the crime for which he is on trial. The wisdom and justice of the rule are unchallenged. United States of America v. John T. Goodwin 492 F2d 1141, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155 (1974) Fifth Circuit.

In the case of Erwing, The Court held that: " Appellant Erwing contends on this appeal that the district court committed prejudicial error in the admission of testimony and exhibits relating to a narcotic offense not set forth in the indictment. We have reached the conclusion that such contention must be upheld." Erwing v. United States 296 F.2d 320,323, 324. (1961) 9th Circuit.

In the case of Broadway, the Court held that: "We start with the general rule which is of course that evidence which shows or tends to show commission of crimes not charged is inadmissible in a trial for a particular crime, ..." United States v. Broadway 477 F.2d 991 (1973) 994 5th Circuit.

In the case of O'Dell The Court held that: "...It is argued that the evidence tended to show that appellant had committed a crime independent of and unconnected with that for which he was on trial and therefore it was inadmissible. Of course, an accused cannot be convicted upon evidence that he committed another offense; and ordinarily evidence tending to show the commission of a crime wholly separate from, independent of, and without any relation to the one laid in the indictment or information in the case on trial is not admissible....." O'Dell v. United States 251 F.2d 704, 707 10th Circuit, 1958.

In the case of Jacangelo The Court stated: "Second, the evidence of involvement in other crimes was intrinsically inadmissible as highly prejudicial information about a collateral matter not connected with the offense charged. Brown v. United States, 3 Cir., 1936, 83 F.2d 383; Helton v. United States, 5 Cir., 1955, 221 F.2d 338. This was a far more serious matter than the technical objection to the

statement as hearsay. To inform the jury of prior crimes of a defendant is, in the view of the Supreme Court, so improper and so prejudicial that a mistrial must be declared, even when the jurors assert that they can and will disregard that information." Jacangelo v. United States 281 F.2d 574, 576 577 3rd Circuit 1960.

In the case of Eley The Court stated: "The admission of evidence of convictions unrelated in time or of specific acts was error. It may not be justified by the rule applicable to cases where guilty knowledge or intent is an essential element of the crime charged so that acts similar in character and related in time may aid in disclosure of intention. Convictions in 1930 can have no possible bearing upon alleged law violations in 1938, and accusations of specific law violations in 1938, with which the appellant is not charged, and of which he does not stand convicted, must be excluded on the often asserted ground that while an accused must be prepared to meet an attack upon his character as evidenced by his reputation, he cannot fairly be required, without notice, to defend against every possible aspersion which may be made against him. Nor can proof of an unlawful act, wholly unrelated to the crime charged, be considered admissible on any ground. The cases cited by the government, wherein defendants have testified and, upon a proper foundation being laid, have thereafter been impeached by evidence that challenges their credibility, are not at all in point." Eley v. United States 117 F.2d 526, 528, 529 6th Circuit 1941.

In the Ralls case the Court stated: " The Courts have long recognized that proof of other crimes committed by a defendant may prejudice the defendant with the members of the jury and deny him a fair trial. As

the Supreme Court stated more than eighty years ago:

'Proof of (other crimes committed by the defendants) only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no (real) value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death.'

Boyd v. United States, 142 U.S. 450, 458, 12 S.Ct. 292, 295, 35 L.Ed. 1077 (1892). In Michelson v. United States, 335 U.S. 469, 69 S.Ct 213, 93 L.Ed. 168 (1948), the Court made it clear that unless the defendant himself opens up the issue of his character, the prosecution is absolutely prohibited from introducing any evidence on the subject. Thus, as a general rule, the law

'simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.'

Id. at 475-476 (footnotes omitted).

The Court of Appeals for the Second Circuit has recently had occasion to discuss this issue in a case very similar to the instant case. In United States v. Harrington, 490 F.2d 487 (2d Cir. 1973)...."

Ralls v. Manson 375 F. Supp. 1271, 1287 - United States District Court, D. Connecticut 1974.

ADDITIONAL CITATIONS:-

United States v. Lawrence 480 F.2d 688 1973 5th Circuit

United States v. Hines 470 F. 2d 225 1972 3rd Circuit

POINT IV

The Appellant, Vivas, joins in the brief of Appellant Bermudez in toto and with special reference to Points VI, X and XII contained therein.

CONCLUSION

Judgment of conviction should be reversed and the indictment dismissed.

DATED: Brooklyn, New York
May 23rd, 1975

Respectfully submitted
Thomas R. Matarazzo
Attorney for Appellant, Vivas
220 Court Street
Brooklyn, New York 11201

ABBREVIATED APPENDIX
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INDICTMENT

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.



MAY 30 1974



TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X

UNITED STATES OF AMERICA

- against -

Cr. No. _____
(T. 21 U.S.C., §846 and
§841(a)(1)
T. 18 U.S.C., §2))

EDUARDO BERMUDEZ,
JORGE VIVAS also known as
Jorge Posos,
ISRAEL DIAZ-MARTINEZ,
MANUEL FIFFE also known as
"Pfiefel",
VICTOR BLANCO also known as
"Red", and
LUIS FELIPE MIRANDA,

Defendants.

- - - - - X

THE GRAND JURY CHARGES:

COUNT ONE

On or about between the 31st day of October, 1973,
and the 1st day of May, 1974, both dates being approximate and
inclusive, within the Eastern District of New York and else-
where, the defendants EDUARDO BERMUDEZ, JORGE VIVAS also known
as Jorge Posos, ISRAEL DIAZ-MARTINEZ, MANUEL FIFFE also known
as "Pfiefel", VICTOR BLANCO also known as "Red", and LUIS FELIPE
MIRANDA, together with Juanita Diaz also known as "Jenny", herein
named as a co-conspirator but not as a defendant, and others,
did knowingly and intentionally conspire to violate Section
841(a)(1) of Title 21, United States Code.

INDICTMENT

1. It was a part of said conspiracy that the defendants and co-conspirators would knowingly and intentionally distribute and possess with intent to distribute cocaine hydrochloride, a Schedule II narcotic drug controlled substance.

2. It was further a part of said conspiracy that the defendants and co-conspirators would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities. (Title 21, United States Code Section 846).

COUNT TWO

On or about the 5th day of November, 1973, within the Eastern District of New York, the defendants VICTOR BLANCO, also known as "Red" and MANUEL FIFFE, also known as "Pfiefel" did knowingly and intentionally possess with intent to distribute approximately one ounce of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21 United States Code, Section 841(a)(1) and Title 18 United States Code Section 2).

COUNT THREE

On or about the 5th day of November, 1973, within the Eastern District of New York, the defendants VICTOR BLANCO, also known as "Red" and MANUEL FIFFE, also known as "Pfiefel" did knowingly and intentionally distribute approximately one ounce of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21 United States Code, Section 841(a)(1) and Title 18 United States Code Section 2).

INDICTMENT

COUNT FOUR

On or about the 12th day of November, 1973, within the Eastern District of New York, the defendants VICTOR BLANCO, also known as "Red", MANUEL FIFFE, also known as "Pfiefel" and LUIS FELIPE MIRANDA did knowingly and intentionally possess with intent to distribute approximately 1/8 kilogram of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21 United States Code, Section 841(a)(1) and Title 18 United States Code Section 2).

INDICTMENT

COUNT FIVE

On or about the 12th day of November, 1973, within the Eastern District of New York, the defendants VICTOR BLANCO, also known as "Red", MANUEL FIFFE, also known as "Pfiefel" and LUIS FELIPE MIRANDA did knowingly and intentionally distribute approximately 1/8 kilogram of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21 United States Code, Section 841(a)(1) and Title 18 United States Code Section 2).

INDICTMENT

COUNT SIX

On or about the 20th day of November, 1973, within the Eastern District of New York, the defendants EDUARDO BERMUDEZ, JORGE VIVAS, also known as Jorge Posos, MANUEL FIFFE, also known as "Pfiefel" and VICTOR BLANCO, also known as "Red" did knowingly and intentionally possess with intent to distribute approximately 1/2 kilogram of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21 United States Code, Section 841(a)(1) and Title 18 United States Code Section 2).

A TRUE BILL

James W. McHenry
FOREMAN

David T. Loefer
UNITED STATES ATTORNEY

TITLE OF CASE

ATTORNEYS

THE UNITED STATES

For U. S.:

vs.

FIFFE-Legal Aid-15 Park 1

X EDUARDO BERMUDEZ

for deft BERMUDEZ:

X JORGE VIVAS aka Jorge Posos

Charles Sutton

X ISRAEL DIAZ-MARTINEZ

299 Broadway, NYC.

MANUEL FIFFE aka "Pfiefel"

964-8612

VICTOR BLANCI aka "Red"

For Defendant: MIRANDA

LUIS FELIPE MIRANDA

Frank Lopez-31 Smith St.

B'klyn, N.Y. - 237-9500

Did conspire to distribute cocaine, etc.

ABSTRACT OF COSTS

AMOUNT

CASH RECEIVED AND DISBURSED

DATE

NAME

RECEIVED

DISBURS

Fine,

2/7/75

Notice of appeal (No Fee)

Clerk,

VIVAS and BERMUDEZ)

Marshal,

2-20-75

Fines of Appeal - Diaz

5

Attorney,

2-20-75

Fines of Trial - Martinez

5

Commissioner's Court,

Witnesses,

DATE

PROCEEDINGS

5-30-74 Before WEINSTEIN J - Indictment filed ordered sealed by the Court - Bench Warrants Ordered and Issued for all defts.

6-21-74 Before MISHLER, CH J - case called - defts BERMUDEZ & VIVAS present without counsel - Sealed Indictment ordered opened - Interpreter E. Rodriguez present - the court advised defts of their rights - arraignment continued to June 24 1974 @ 9:30 am .
Bail set at \$250,000 as to defts BERMUDEZ & VIVAS.

6-24-74 Notice of Appearance filed (VIVAS)

6-24-74 Before MISHLER, CH J - case called - defts BERMUDEZ, VIVAS & BLANCI present - Interpreter E. Rodriguez present for the defts - counsel for deft VIVAS present - deft VIVAS arraigned and enters a plea of not guilty - bail set at \$50,000 P/R Bond with wife to sign as surety and also the deed to his house - court to assign counsel

DOCKET

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
	for defts. BERMUDEZ & BLANCO - pleading adjd without date as to defts		
	BERMUDEZ & BLANCO.		
-74	By MISHLER, CH.J. - Order appointing counsel filed (BERMUDEZ)		
-74	By MISHLER CH.J. - Order appointing counsel filed (BLANCO)		
-74	Bench warrant ret'd and filed - executed (ISRAEL DIAZ-MARTINEZ)		
-74	Before MISHLER, CH.J. - Case called - Deft Diaz-Martinez and counsel presen:		
	Deft arraigned and enters a plea of not guilty - Bail set at \$50,000 surety		
	co. bond or a P/R Bond secured by \$2,500 in cash and any interest in his		
	home. Wife of deft to sign as surety - Deft has until 7-3-74 at 4:00 P.M.		
	to comply to the bail condition		
-74	Notice of appearance filed (DIAZ-MARTINEZ)		
-74	Petitions for writs of habeas corpus ad prosequendum filed (MIRANDA and		
-74	By MISHLER, CH.J. - Writs issued, ret. 7-8-74 (MIRANDA and FIFFE)		
-74	By SCHIFFMAN, MAG. - Order for acceptance of cash bail filed (DIAZ MARTINEZ		
-74	Magistrates Proceeding and Certified copy of Warrant of removal received		
	from Eastern District of Louisiana and filed (EDUARDO BERMUDEZ)		
-74	Before MISHLER, CH.J. - Case called - Deft FIFFE and deft MIRANDA presen:		
	with counsel - Court appointed Legal Aid as counsel for the deft FIFFE -		
	Interpreter Emil Rodriguez present for deft FIFFE - Both defts arraigned and		
	each enters a plea of not guilty - Bail set at \$50,000.00 surety co. bond		
	to both deft - Trial set for 9-30-74		
-74	Notice of appearance filed (MIRANDA)		
-74	Writ ret'd and filed ^{executed} (FIFFE)		
-74	Writ ret'd and filed - executed (MIRANDA)		
-74	By MISHLER, CH.J. - Order appointing counsel filed (FIFFE)		
-74	Certificate of Engagement filed - above case set down for trial		
	for Sept. 30, 1974 at 10:00 am in courtroom #5. signed by Chief		
	Judge Jacob Mishler dated July 9, 1974. (attys notified)		
-74	Before MISHLER, CH J - case called - motion for reduction of bail		
	as to deft BERMUDEZ - bail reset at \$100,000 surety Company bond.		
-74	Writs ret'd and filed - Executed (Miranda) (Fiffe)		
-74	Before MISHLER, CH J - case called - motion for reduction of bail as		
	to deft BERMUDEZ - motion argued - decision reserved.		
-74	Before MISHLER, CH J - case called - motion for reduction of bail as		
	to deft Miranda - Bail is modified to \$50,000 personal bond to be		
	secured by a cash deposit of \$5,000.00.		
-74	Magistrates' File 74M974 inserted into CR file		
-74	Notice of Motion filed, ret. 8-23-74, for Inspection, Bill of Particulars		
	(deft Israel Diaz-Martinez)		

DATE	PROCEEDINGS
8-16-74	Before Mishler, Ch J - case called - motion for reduction of bail argued (Victor Blanco) On application by the Govt the bail is reduced to \$10,000 P/R Bond signed by defts sister.
8-23-74	Before MISHLER, CH. J. - Case called- Motion for an order pursuant to Rule 16 argued- motion granted and denied as indicated on record (DIAZ-MARTINEZ)
9-9-74	Notice of motion for severance, etc. filed rete. 9-13-74 (DIAZ-MARTINEZ)
9-13-74	Before MISHLER, CH. J. - Case called- Motion for severance argued- motion denied (ISRAEL DIAZ-MARTINEZ)
9-20-74	By MISHLER, CH. J. - Order appointing counsel filed (FIFFE)
9-20-74	Petition for writ of habeas corpus ad prosequendum filed - (FIFFE)
9-20-74	By WEINSTEIN, J. - Writ issued & ret. 9-24-74 (FIFFE)
9-24-74	Writ ret'd and filed- executed (FIFFE)
9-24-74	Petitions for writs of habeas corpus ad prosequendum filed (BLANCO, MIRANDA and FIFFE)
9-24-74	By MISHLER, CH. J. - Writs issued, ret. 9-25-74 (above 3 defts)
9-26-74	Petition for writ of habeas corpus ad Prosequendum as to defts BLANCO, MIRANDA FIFFE Filed.
9-26-74	By JUDD, J. - Writs issued ret. 9-28-74 as to defts BLANCO, MIRANDA and FIFFE.
9/28/74	Petition for Writ of Habeas Corpus Ad Prosecuendum filed (V. BLANCO)
9/28/74	By JUDD, J. - Writ issued, ret. 9-27-74
9-30-74	Before Judd, J - case called - defts & counsels present - adjd to Oct. 4, 1974 for motions and Oct. 15, 1974 for trial.
10/1/74	Writs ret'd and filed executed (BLANCO(2), FIFFE(2), and MIRANDA)
10-2-74	Notice of Appearance filed as to deft BERMUDEZ.
10-3-74	Notice of Motion filed for review of bail, etc. (ret. 10-4-74) deft Bermudez.
10-3-74	Petition for Writ of Habeas Corpus Ad Prosequendum filed (FIFFE)
10-3-74	By MISHLER, CH J - Writ Issued, ret. Oct. 7, 1974 (FIFFE)
10/4/74	Before MISHLER, CH. J. - Case called- Motion by deft Diaz-Martinez for a severance argued- motion denied - deft BERMUDEZ and counsel present interpreter present- motion for reduction of bail argued- bail reduced to \$50,000.00 cash, deposit of \$5,000.00- with the wife and mother in signing as surety-Also wife and mother in law to surrender passports.
10-8-74	Writ ret'd and filed - executed (Fiffe)

DATE

DOCKET

PROCEEDINGS

10/21/74 Before MISHLER, CH.J.- Case called- Defts BERMUDEZ, VIVAS and DIAZ-MARTINEZ present with counsel- Interpreters present- Trial resumed Motion by deft DIAZ-MARTINEZ for severance is denied- Motions by defts VIVAS and DIAZ-MARTINEZ for a mistrial is denied- Trial contd to 10/22 at 10:00 A.M.

10-22-74 Before MISHLER, CH J - case called - defts BERMUDEZ, VIVAS & DIAZ-MARTINEZ present with counsels - Interpreters J.Guma and Emil Rodriguez present - trial resumed - Govt rests - motion by defts BERMUDEZ & VIVAS to dismiss counts 1 and 6 is denied - Motion by deft DIAZ-MARTINEZ for severance, mistrial and dismissal is denied - Trial continued to Oct. 23, 1974.

10-23-74 Before MISHLER, CH J - case called - defts present with counsels trial resumed - Interpreters Guma & Rodriguez present - defts Bernudez & Vivas rest. Motion by deft Diaz-Martinez for mistrial is denied. Deft Diaz=Martin rests - trial contd to Oct. 24, 1974.

10/24/74 Before MISHLER, CH.J.- Case called- defts BERMUDEZ, VIVAS, and DIAZ-MARTINEZ, present with counsel- Interpreters present- Trial resumed Govt and defts reset- Motion by the defts to dismiss the indictment- motion denied- Trial contd to 10/25/74 at 10:00 A.M.

10/24/74 By MISHLER, CH.J.- Order of sustenance filed

10/25/74 Before MISHLER, CH.J.- Case called- Defts BERMUDEZ, VIVAS and DIAZ-MARTINEZ present with counsel- Interpreters present- Trial resumed- Jury retires to deliberate- At 7:30 P.M. jury advised the court that they would like to return tomorrow for further deliberation- Court excused Jury for day and are to resume deliberations on 10/26/74 at 11:30 A.M.

10/25/74 By MISHLER, CH.J. - Order of sustenance filed

10/26/74 Before MISHLER, CH.J.- Case called- Defts BERMUDEZ, VIVAS and DIAZ-MARTINEZ present with counsel- Interpreter J. Guma present- Trial resumed At 12:15 jury resumed their deliberations - Order of sustenance signed for lunch- At 4:05 jury returned and rendered a verdict of guilty on count 1 as to deft BERMUDEZ, VIVAS and DIAZ-MARTINEZ, and not guilty on count 6 as to defts BERMUDEZ and VIVAS- Jury polled- Jury discharged Trial concluded- Memo of verdict signed by the foreman and ordered filed Bail conditions contd- All motions reserved until sentence- sentence adjd without date

10/26/74 By MISHLER, CH.J.- Order of sustenance filed

10/26/74 Memorandum of verdict filed

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PROCEEDINGS

- 9-74 ~~thru~~ Petition for Writ of Habeas Corpus Ad Prosequendum filed (defts Fiffe, Victor Blanco & Luis Felipe Miranda)
- 9-74 By COSTANTINO J - Writs issued, ret. Oct. 10, 1974 as to Luis Felipe Miranda and ret. Oct. 9, 1974 as to Fiffe & Blanco.
- 9-74 Notice of Motion filed (deft Israel Diaz-Martinez) for suppressing evidence etc. (forwarded to Chambers) ret. date Oct. 15, 1974.
- 9/74 By CATOGGIO, MAG.- Order for acceptance of cash bail filed (EDUARDO BERMUDEZ)
- 11/74 Petitions for writs of habeas corpus ad prosequendum filed (FIFFE, MIRANDA)
- 11/74 By MISHLER, CH.J.- Writs issued, ret. forthwith
- 11-74 Before MISHLER, CH J - case called - motion for vacating search warrant, etc. Motion argued and motion denied. (Israel Diaz-Martinez)
- 10-75 Writs re'd and filed - Executed as to defts FELIPE MIRANDA, BLANCO & FIFFE.
- 15/74 Before MISHLER, CH.J.- Case called- Deft BERMUDEZ, VIVAS, MARTINEZ, FIFFE BLANCO and MIRANDA present with counsel- Defts FIFFE, BLANCO and MIRANDA withdraw their pleas of not guilty and after being advised of their rights by the court and on their own behalf each enter a plea of guilty to count 1- Motion by govt to sever as to defts FIFFE, BLANCO MIRANDA is granted- Trial ordered and begun- Jurors selected and sworn- Interpreters present- Trial cont to 10/16/74 at 10:00 A.M.
- 16-74 Before MISHLER, CH J - case called - defts BERMUDEZ, VIVAS, DIAZ & MARTINEZ present with counsels - Interpreters J. Guma and Emil Rodriguez present - trial resumed - motion by deft DIAZ-MARTINEZ for a severance is denied - motion by defst VIVAS & DIAZ-MARTINEZ is denied - trial contd to Oct. 17, 1974.
- 17/74 Before MISHLER, CH.J.- Case called- Deft BERMUDEZ, VIVAS and DIAZ-MARTINEZ present- Trial resumed- Motion by deft DIAZ-MARTINEZ for a mistrial is denied- Hearing held on motion to suppress- Hearing contd to 10/18/74 at 9:30 A.M.- Trial contd to 10/18/74 at 10:00 A.M.
- 18-74 Govts Memorandum of Law, defts Memorandum of Law in support of motion for an order vacating the search warrant issued for 293 Grand Street and suppressing all evidence etc. filed received from Chambers and returned.
- 18-74 Before MISHLER, CH.J.- Case called- Deft DIAZ-MARTINEZ and counsel present- Hearing resumed- Motion to suppress is granted- Hearing concluded- Defts BERMUDEZ, VIVAS and DIAZ-MARTINEZ present with counsel- Interpreters present- Trial resumed- Motion by defts BERMUDEZ and DIAZ-MARTINEZ for a mistrial denied- Trial contd to 10/21/74 at 10:00 A.M.

Abbott-direct

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A Yes, I did.

Q Will you tell us when you met Mr. Blanco and under what circumstances.

A I was taken to Mr. Blanco's residence by an informant. We arrived at Mr. Blanco's apartment --

MR. SUTTON: Objection and move to strike.

THE COURT: May I have that.

(Question and answer read.)

THE COURT: The witness is testifying to matters and events that took place when none of these defendants were present.

In our law an accused is chargeable only with what that accused says and does and not anybody says or does or not what anybody says about him. That makes sense because criminal liability is a personal thing. A man is chargeable with his own actions and own words and nobody elses.

There is one exception among others to the rule. These defendants are charged with being part of a conspiracy. A conspiracy is defined as being a partnership in a criminal venture -- a criminal business.

Now, in a legitimate business every partner is responsible for what every other partner does during the term of the partnership and for transactions or

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2 conversations that are performed or undertaken in order
3 to advance the business. For example, if one of you
4 and I were in let us say the grocery business, and
5 let us assume I was the man behind the counter and
6 I was dealing in the retail trade and selling all the
7 cans and beer and butter and bacon, and let us say that
8 one of you were the one that went out and bought all
9 the merchandise, and one day you decided to buy 500
10 cases of canned corn. I do not know a thing about it.

11 As a matter of fact, I opposed it because I
12 knew, being behind the counter, that we sell only
13 three cans of corn a month. Well, if you made that
14 purchase I'd be bound by it, even though I knew nothing
15 about it because in a legitimate partnership every
16 partner is bound by the acts -- we call it -- within
17 the scope of authority of the partners, done during the
18 term of the partnership and to advance the business of
19 the partnership and so in a criminal partnership.

20 Once the Government proves beyond a reasonable
21 doubt that the partnership, as alleged in the indictment,
22 existed for the purposes and at the time and place
23 charged -- the charge is on or about and between the
24 31st day of September and the 1st day of May 1974 --
25 and the purpose of the partnership was to knowingly

Abbott-direct

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2 and intentionally distribute and possess with the intent
3 to distribute cocaine hydrochloride, I said that means
4 in effect to buy and sell and deal in cocaine, and the
5 Government proves beyond a reasonable doubt that
6 Mr. Blanco -- Victor Blanco was a member of that
7 conspiracy -- in other words, was a co-conspirator,
8 then any accused -- I am sorry, I have gone a little
9 too fast.

10 And further the Government proves beyond a
11 reasonable doubt that the transactions, the conversa-
12 tions were during that term -- the term of the partner-
13 ship -- and for the business of the partnership, again
14 to deal in cocaine, then any accused that the Govern-
15 ment proves knowingly and wilfully became a member
16 of that conspiracy by proof beyond a reasonable doubt
17 is bound by what the conspirators said and did.

18 Now, when I say, "knowingly and wilfully
19 entered into the conspiracy," it means that the
20 Government's proof that the accused was aware of what
21 he was doing, aware of the purpose of the conspiracy,
22 that it was to deal in cocaine, and entered into it
23 knowing it was a violation of law.

24 If the Government does not prove all of those
25 conditions, just disregard it.

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2 When I use the word "accused," I use it sin-
3 gularly or plural.

4 If the Government proves all that, then of
5 course first the Government must prove that the accused
6 became a member of the conspiracy even before you
7 even consider it.

8 If the Government proves all that, then that
9 accused that the Government proves became a member of
10 the conspiracy, is bound by the statements and acts
11 of the co-conspirators, even though that accused did
12 not know that the transaction was about to occur or
13 would occur or had occurred, even though he may have
14 objected to it and even though he may not have been
15 present.

16 The analogy is, as I say, to a legitimate
17 partnership. You hold this testimony in a cubby-hole
18 and see if the Government fulfills all those conditions.
19 If it does not, just disregard the testimony. If it
20 does, then charge it against the accused who is a
21 member of the conspiracy.

22 MR. SUTTON: May we have a sidebar?

23 THE COURT: The jury may be excused.

24 (The jury left the courtroom.)

25 (Continued on next page.)

HRS:jm
T3pmR2

1 MR. SUTTON: I believe your explanation of
2 the idea of a conspiracy has omitted to express or set
3 clearly to the jury the essence of a conspiracy, which
4 is the knowing and willful agreement of a party or
5 parties that are involved, and is not a falling into
6 like an accidental partnership or an informal partner-
7 ship or anything of that kind and it is not similar to
8 a civil partnership in any respect that we are talking
9 about here. There must be, as I understand it, the
10 necessity of a willful, knowing agreement -- an
11 intelligent agreement of this unlawful enterprise.

12 THE COURT: Mr. Shapiro, would you read back the
13 part where I said the Government must prove that an
14 accused knowingly and willfully entered into the
15 conspiracy and I defined what I meant by knowingly and
16 willfully?

17 MR. SUTTON: I do not think you used the word
18 agreement.

19 THE COURT: I didn't?

20 MR. SUTTON: I do not think so.

21 THE COURT: Did I use conspiracy?

22 MR. SUTTON: You used conspiracy.

23 THE COURT: You say I have to use agreement?

24 MR. SUTTON: Yes.

25 THE COURT: I won't use it. There are no magic

1 words and you cannot give them to me.

2 MR. SUTTON: If you defined --

3 THE COURT: Get the charge book and I will read
4 it word for word from the charge book. I will give it
5 to them word for word from the charge book.

6 MR. SUTTON: Isn't a conspiracy an agreement?

7 THE COURT: If I can try to comply with the
8 wishes of defense counsel, I will do it. I will give
9 it to you right out of the charge book word for word.

10 MR. SUTTON: Why does it hurt --

11 THE COURT: Because there is no need to argue a
12 point like this. I want to prove my point.

13 MR. SUTTON: I would also --

14 THE COURT: You say it is inadequate because I
15 did not use the word, "agreement".

16 MR. SUTTON: Yes.

17 May I also call to your attention that you also
18 said that if a defendant opposed it, that goes again
19 to the issue of whether or not your statement of
20 opposition was after the entrance into the conspiracy
21 and whether you failed to include that the opposition
22 to it may mark a termination of a conspiracy.

23 THE COURT: Mr. Sutton, I will correct my
24 mistake in the charge by reading it word for word from
25 the charge book.

1 MR. SUTTON: You put us at a disadvantage at
2 this point. We are now going to have to be figuring
3 up the charge to the jury at mid-trial --

4 THE COURT: Look what we are doing here. In
5 the middle of an answer we are interrupting for this
6 needless colloquy.

7 MR. SUTTON: I am compelled to do it, because
8 we have a jury that has been told certain things.

9 THE COURT: If the jury was misinformed, I will
10 correct it.

11 MR. MAHLER: I would like to join in Mr. Sutton's
12 remarks and I would make a similar objection.

13 THE COURT: All right.

14 In any time one defendant makes an objection,
15 it inures to the benefit of all three, unless one gets
16 up and indicates that he departs from the position
17 taken by the others.

18 Call the jury in.

19 (Jury present.)

20 THE COURT: Please disregard everything that I
21 said about the definition of conspiracy.

22 I am going to read to you what is almost a
23 text book definition of conspiracy:

24 "A conspiracy is a combination of two or more
25 persons, by concerted action, to accomplish some

1 unlawful purpose or to accomplish some lawful purpose
2 by unlawful means.

3 "So, a conspiracy is a kind of partnership in
4 criminal purposes in which each member becomes the
5 agent of every other member.

6 "The gist of the offense is a combination or
7 agreement to disobey or disregard the law.

8 "Mere similarity of conduct among various
9 persons and the fact that they may have associated
10 with each other and may have assembled together and
11 discussed common aims and interests, does not necessarily
12 establish proof of the existence of the conspiracy.

13 "However, the evidence in the case need not
14 show that the members entered into any express or
15 formal agreement or that they directly, by words
16 spoken or in writing, stated between themselves what
17 their object or purpose was to be or the details there-
18 of, or the means by which the object or purpose was
19 to be accomplished.

20 "What the evidence in the case must show beyond
21 a reasonable doubt in order to establish proof that a
22 conspiracy existed, is that the members in some way or
23 manner or through some contrivance positively or
24 tacitly came to a mutual understanding to try to
25 accomplish a common and unlawful plan.

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follows

Abbott-direct

JB:ss
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fll:HS

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2 THE COURT: (Continuing.) The evidence in the
3 case need not establish that all of the means or
4 methods set forth in the indictment were agreed upon
5 to carry out the alleged conspiracy, nor that all the
6 means or methods which were agreed upon were actually
7 used and put into operation, nor that all of the
8 persons charged to have been members of the alleged
9 conspiracy were such.

10 What the evidence in the case must establish
11 beyond a reasonable doubt is that the alleged con-
12 spiracy was knowingly formed and that one or more
13 of the means or methods described in the indictment
14 were agreed upon to be used in an effort to effect
15 or accomplish some object or purpose of the conspiracy
16 as charged in the indictment; and that two or more
17 persons, including one or more of the accused, were
18 knowingly members of the conspiracy as charged in the
19 indictment.

20 Now, I gave you that because I wanted you to
21 know how to treat evidence of conversations or acts
22 out of the presence of the accused. I will read that
23 charge.

24 Whenever it appears beyond a reasonable doubt
25 from the evidence in the case that a conspiracy existed

Abbott-direct

and that a defendant was one of the members, and the statements and the acts by any person likewise found to be a member may be considered by the jury as evidence in the case as to the defendant found to have been a member even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy and in furtherance of some object or purpose of the conspiracy. Otherwise, any admission or incriminatory statements made or acts done outside of Court by one person may not be considered as evidence in the case against any person who is not present and heard the statements made or saw the acts done.

Now, before you may charge a defendant with the acts or declarations of one conspiracy outside his presence or without his knowledge there must be proof beyond a reasonable doubt of his entry, his membership in the conspiracy.

And, again, I will give you what is almost a textbook definition of the type of evidence necessary to bring an accused into the conspiracy.

One may become a member of the conspiracy without

1 3 Abbott-direct
2 full knowledge of all the details of the conspiracy.
3 On the other hand, the person who has no knowledge of
4 the conspiracy but happens to act in a way which
5 furthers some object or purpose of the conspiracy does
6 not therefore become a conspirator. Before the jury
7 may find that a defendant or any other person has
8 become a member of the conspiracy, the evidence in
9 the case must show beyond a reasonable doubt that
10 the conspiracy was knowingly formed and that the
11 defendant or other person who is claimed to have been
12 a member knowingly participated in the unlawful plan
13 with intent to advance or further some object or pur-
14 pose of the conspiracy.

15 To act or participate knowingly means to act
16 or participate voluntarily and intentionally and not
17 because of mistake, accident or other innocent reason.

18 So if a defendant or other person with under-
19 standing of the unlawful character of a plan intention-
20 ally encourages, advises or assists for the purpose of
21 furthering the undertaking or scheme, he thereby
22 becomes a knowing participant.

23 A conspirator, one who knowingly joins an
24 existing conspiracy, is charged with the same
25 responsibility as if he had been one of the originators

4 Abbott-direct

or instigators of the conspiracy.

In determining whether or not a defendant or any other person was a member of the conspiracy, you are not to consider what others may have said or done. That is to say, the membership of a defendant or any other member of the conspiracy must be established by the evidence in the case as to his own conduct, what he himself knowingly said or did.'

With that you may continue, Mr. Kimelman.

MR. KIMELMAN: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. KIMELMAN: (Cont.)

Q Special Agent Abbott, I ask you when and where you met Victor Blanco. Will you tell us again, please?

A I met Victor Blanco in his apartment at approximately 4:30 p.m. on October 31st, 1973.

Q Where is this apartment located?

A 97 Clinton Avenue, Brooklyn.

Q who else was present at that time?

A With me?

Q Yes.

A An informant.

MR. STTON: I can't hear, your Honor.

THE COURT: Would you repeat the --

1 that mere association isn't enough. If I say that,
2 I'll give the whole charge.

10 3 MR. MAHLER: Judge, I only brought it up --

4 THE COURT: We'll take a five-minute recess.

5 (Recess had.)

6 MR. MAHLER: Your Honor, I expect to be about
7 twenty minutes.

8 THE COURT: Seat the jury.

9 (Jury in.)

10 THE COURT: Now, I ruled that the questions and
11 the answers to questions relating to some talk about
12 marijuana were totally irrelevant to the charge in
13 this indictment. And I advised the United States
14 Attorney that it was improper to develop the testimony
15 as to those conversations.

16 The defendants are here ready to defend on the
17 charge in this indictment, and I'll just ask you to
18 strike it from your consideration and your minds, just
19 as I have directed the court reporter to strike it
20 from his recording.

21 Now you can go on, Mr. Kimelman, from there.

22 MR. KIMELMAN: Thank you, your Honor.

23
24 (continued on next page)
25

CHARGE

Fiffe - cross - Mahler

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THE COURT: I heard you. This witness said he refreshed the dates from the charges in the indictment and the Jury -- Mr. Mahler asked what dates are stated in the indictment, and he asked me to read them, and I'll be glad to oblige him.

MR. SUTTON: Is it possible, your Honor, that the Court again cautions the Jury that the testimony is not binding on the defendant Bermudez?

THE COURT: No. You haven't advanced any theory by which it wouldn't be binding. I will give the limiting instruction again on conspiracy, if you wish, that I'd be glad to give. It will only be binding on the fulfillment of all the conditions.

If you want that I'll give it.

MR. SUTTON: Yes, sir.

THE COURT: Sure, I'll be glad to give that. Seat the Jury.

(Jury present.)

THE COURT: Count One of the indictment, on or about and between the 31st day of October, 1973, and the 1st day of May, 1974, both dates being approximate and inclusive.

Count Two of the indictment is not before you but charges this witness and others, on or about

CHARGE

Fiffe - cross - Mahler

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November 5, 1973.

Count Three of the indictment does not charge any of the defendants before you but charges this witness and others, on or about the 5th day of November, 1973.

Count Four of the indictment does not charge any of the defendants before you but charges this witness and others on or about the 12th day of November, 1973.

Count Five of the indictment does not charge any of the defendants before you but charges this witness and others on or about the 12th day of November, 1973.

Count Six I read to you at the outset, or if I haven't, I'll read it in full:

"On or about the 20th day of November, 1973, within the Eastern District of New York, the said Eduardo Bermudez, Jorge Vivas, also known as Jorge Josas, Manuel Fiffe, also known as Pfiefel, and Victor Blanco, also known as Red, did knowingly and intentionally possess, with intent to distribute, approximately one-half kilogram of cocaine hydrochloride, a Schedule 2 narcotic drug controlled substance."

I have been asked to remind you about the

Fiffe - cross - Mahler

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limiting effect of testimony given by this witness, that he says was outside of the presence of any of the defendants.

If you recall, I read almost at the outset fo the trial a charge to you on when statements or acts of a co-conspirator can be attributed and charged against -- can be attributed to and charged against accused.

In our system of juris prudence, an individual is responsible for only what that individual says or does, not what someone else says or does. One of the exceptions is where we have a conspiracy, where a conspirator becomes the agent and as an agent binds every other member of the conspiracy with relation to what the conspirator says or does during the term of the conspiracy, and what he says or does to advance the business of the conspiracy.

(Continued on next page.)

M:BD
am

Fiffe-cross/Mahler

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2 THE COURT: First the Government must prove
3 that a conspiracy existed and that proof must be
4 beyond a reasonable doubt, then if the Government
5 proves beyond a reasonable doubt that the witness
6 was a member of the conspiracy or that the individual
7 he spoke with was a member of the conspiracy, then
8 whatever the conspirators who took part in the conversa-
9 tion or performed the acts said or did, during the
10 time of the conspiracy, and you heard the term on or
11 about and between the 31st day of October 1973 and
12 the 1st day of May of 1974, both dates being approxi-
13 mate, and if you find the acts or declarations worked
14 to advance the purpose of the conspiracy, or part of
15 the business of the conspiracy, that it concerned in
16 this case cocaine, then any accused who you find the
17 Government proved beyond a reasonable doubt knowingly
18 and willfully entered into that conspiracy is also
19 bound by what that co-conspirator said or did, even
20 though that co-conspirator, even though the accused
21 did not know, wasn't aware of what was said or done.

22 Now, I charge you now that the Government must
23 prove that the entrance into the conspiracy was
24 knowingly and wilfully, in other words that the
25 accused was aware of what the business of the

Fiffe-cross/Mahler

conspiracy was, understood that it was for dealing in cocaine, possessing it, distributing it and selling it, and that knowing that participated in it, knowing that his participation was to advance the purpose of the conspiracy.

If the Government does not prove all the conditions beyond reasonable doubt disregard the testimony of any witness concerning conversations or acts performed outside the presence of the accused.

All right, you may proceed, Mr. Mahler.

CORSS-EXAMINATION

BY MR. MAHLER (Continued):

Q Do you see the date November 8th in that indictment?

MR. KIMELMAN: Objection.

THE COURT: I will allow it.

A Yes.

Q You do?

A No, it is something --

MR. SUTTON: Objection, your Honor. Anything after the word no.

THE COURT: Strike it out as not responsive.

Q Yes or no, do you see the date November 8th in the indictment?

ER:tr
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(The jury took its place in the Jury box.)

Charge of Honorable Jacob Mishler, Chief
United States District Judge.

THE COURT: Madam Forelady and ladies and
gentlemen of the jury:

We have reached that point in the trial where
it becomes my duty to instruct you on the applicable
law.

The lawyers have completed their tasks, they
have performed their obligations, their obligations
relate to the relationship they have with their
clients.

Both the Government and the defendants are
represented by attorneys. As you are aware, Mr.
Kimelman's client is the Government, the three
defendants are represented respectively by Mr.
Sutton, Mr. Mattarazzo and Mr. Mahler.

Everyone is treated the same in this court
room, Mr. Kimelman isn't given any greater or
different consideration than Mr. Sutton or Mr.
Matarazzo or Mr. Mahler; everyone is treated alike
and that is what we mean by being fair.

But their job is as adversaries, each taking
their respective side in the case and they act in

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2 such a manner as to develop the evidence in the case
3 on the issues that are before you. That is why we
4 call this an adversary proceeding.

5 But there are two other participants in the
6 trial, and that is the jury and the Court, and there
7 is a difference between the Court and jury on the one
8 hand and the lawyers for the parties on the other.

9 The lawyers are protagonists and as such per-
10 form their duty; they should demonstrate their partis-
11 anship and act in such a manner as will do an
12 effective job.

13 The Court and the jury, on the other hand, are
14 objective, nonpartisan. Each of us should look at
15 our obligation and function as requiring determinations
16 based on what the evidence is for the jury and on
17 what the law is for the Court.

18 You are to make your determination free of all
19 bias or prejudice or sympathy.

20 Now as between the Court and the jury, there
21 is a distinct line of demarcation:

22 Each one is a judge, the jury is a judge and
23 the Court is a judge. The jury has the sole authority
24 to judge the facts, that means that the jury and the
25 jury alone determines what happened -- based on the

1
2 evidence of course. The Court should make rulings on
3 the law based on what the Court believes is the law.
4 Each one should respect the authority of the other and
5 be careful not to encroach upon the authority of the
6 other. I don't intend in anyway to suggest any
7 findings whatsoever. That is your job. You on the
8 other hand must respect the authority of the Court
9 and you must accept the law as the Court charges it.

10 I will charge you on any number of principles
11 concerning witnesses, the statutory law, the
12 essential elements of the crimes charged and other
13 principles.

14 You must accept the law even if you don't like
15 the law, even if you feel that Congress was wrong in
16 passing the Drug Abuse Act of 1970, about which I
17 will charge you. The Congress passed the law and we
18 must all accept it as the law. Our individual and
19 personal dislikes as to any instruction that I give you
20 on the law should be set aside.

21 If each one of us knows and respects the
22 authority of the other and understands the function
23 of the lawyers and that a trial is an adversary
24 proceeding, then I think that it will go a long way
25 towards giving the parties a fair trial.

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3 My rulings, my statements during the trial
4 with reference to the rulings, and even a display
5 of irritation that might have been evident during
6 the trial should not influence your determination
7 here; there is nothing personal in my rulings. I
8 hope you understand that the Court at least attempted
9 to treat the lawyers fairly, decided the objections that
10 were made based on what the Court understood the law
11 to be, and that in giving you the instructions now I
12 intend in no way to suggest any opinion which the
13 Court may have as to the outcome of these proceedings.

14 You have before you a document called Memorandum
15 of Verdict. I have struggled a long time over
16 describing the document, but you might as well call
17 it a scrap of paper. It has no standing in the trial
18 as such. It is a useful tool for the jury. With
19 it there is a copy of Count 1 and Count 6 of the
20 indictment.

21 Count 1 and Count 6 are each a verbatim copy
22 of those counts in the indictment while the Memorandum
23 of Verdict is just a paraphrasing, a precept of the
24 charges, and when you go into the jury room to
25 deliberate you may use it for your purposes. I will
ask the foreman to take an extra copy with him and

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2 mark it up to indicate your verdict and then sign it
3 so I may have it as a record.

4 We were talking about the indictment. You must
5 understand at the outset that the indictment is the
6 method by which the law brings someone into court to
7 face a charge and to which the defendants have pleaded
8 not guilty. The statements in the indictment should
9 not be assumed to be true nor should they give any
10 substance to the charges themselves.

11 The indictment is not proof of the charges.
12 It is as if someone, the plaintiff, sued you in a
13 civil case for \$100 and would be saying to you, "You
14 owe me \$100." Well, if you come in to court and say,
15 "No, I don't owe you \$100," plaintiff could not come
16 and say as proof, "Well, there you are, it is in the
17 complaint." That is not proof of the obligation.
18 The plaintiff has to have witnesses come into court
19 and prove that you owe him a hundred dollars. The
20 indictment is submitted to you just so you can keep your
21 eye on the ball and understand that there are really
22 five charges here, five trials in one, three in the
23 first count against all three defendants and two in
24 the second count against the defendants Bermudez and
25 Diaz.

1
2 The Memorandum of Verdict is only a version
3 of what is contained in the indictment so that you
4 may have a precise view of what the charges are
5 against these defendants. The indictment contains
6 other parties and other allegations that might
7 divert your attention from the precise charge and
8 you must keep your eye on the precise charge to
9 see if the Government proved the charge.

10 That is the effect of the two documents that
11 are before you.

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13 (Cont'd on next page.)
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2 In every criminal trial the defendant is
3 presumed to be innocent.

4 I will use the singular or the plural, but it
5 means all the defendants except if I specifically
6 refer to a charge and say this principle or this
7 charge or this instruction refers to a particular
8 defendant.

9 You are to assume otherwise that I am
10 referring to all defendants.

11 All the defendants are presumed to be innocent.
12 That is a time-honored presumption of Anglo-American
13 law. It is a strong presumption, it says in effect
14 you must conclude at the outset of the trial that
15 the defendant is innocent of the crime charged, and
16 that conclusion, that presumption remains with the
17 defendant throughout the trial and throughout your
18 deliberations and prevails unless and until the
19 presumption is overcome by proof to the contrary, to
20 wit by proof beyond a reasonable doubt that the
21 defendant is guilty of the crime charged.

22 The effect of that is very significant: The
23 defendants do not have to prove anything or offer any
24 evidence to prove their innocence. They can rely on
25 the failure of the Government to prove its case by
proof beyond a reasonable doubt.

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2 In other words, your function is not so much
3 to find out if the defendants are innocent or if they
4 are guilty; it is more precisely to determine whether
5 the Government proved the guilt of the defendants by
6 proof beyond a reasonable doubt.

7 In Scotland we have three verdicts -- I should
8 not say "we have" I should say "They have" -- it is
9 guilty, not guilty, not proved.

10 In this country we have only two, guilty, not
11 guilty, but our not guilty verdict includes not proved.

12 The Government's burden is to prove the guilt
13 of the defendant beyond a reasonable doubt. A
14 reasonable doubt is a doubt which a reasonable person
15 has after weighing all the evidence.

16 It is a doubt based on reason and common
17 sense and the state of the record. It is not some
18 vague speculative doubt, it is not some suspicion
19 that you might have. On the other hand, it is not
20 a doubt based on a distaste to perform an unpleasant
21 task.

22 A reasonable doubt is the kind of doubt that
23 would make a reasonable person hesitate to act in a
24 matter of importance in his own life.

25 Proof beyond a reasonable doubt is therefore

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2 proof of such a convincing character that you would
3 be willing to rely upon it unhesitatingly in the most
4 important and weighty of your own affairs.

5 The Government's burden is not to prove the
6 guilt of the defendant beyond all doubt -- there is
7 a qualifying adjective -- it is beyond all reasonable
8 doubt.

9 The Government's burden is not to prove that
10 every bit of evidence offered in the trial is true
11 beyond a reasonable doubt, the Government's
12 burden is to prove every essential element of the
13 crime charged, beyond a reasonable doubt.

14 Later in the charge I will charge you on what
15 the essential elements of the crimes charged are.

16 Again, defendants do not have to prove their
17 innocence; they do not have to offer any proof what-
18 soever; they may rely on the failure of the Government
19 to prove the guilt of the defendant beyond a
20 reasonable doubt.

21 What is evidence is classified as direct
22 evidence or indirect, which is also called circum-
23 stantial evidence.

24 Direct evidence is the testimony of a witness,
25 of what that witness saw or heard. Indirect or

1
2 or circumstantial evidence is a method of determining
3 a disputed fact by drawing an inference from
4 established facts based on your good common sense and
5 experience.

6 If you were sitting as a jury in a civil case,
7 in a personal injury action, and Plaintiff A was suing
8 Defendant B, claiming that B had passed a
9 stop sign without stopping and struck A causing
10 injuries, well, let us use that hypothetical
11 situation, and let us assume Mr. Adler, my Court Deputy,
12 and myself were standing at the corner at the
13 precise time and place where the sign was located;
14 let us assume he had his back to the sign and I was
15 talking with him and had the sign in full view and
16 the roadway in full view: Well, if I were called to
17 the witness stand and asked to testify as to what I
18 saw, I might say, "Well, I saw a white 1974 Cadillac
19 travelling at 65 miles an hour pass the sign, cross
20 the roadway, strike B, and knock B down" -- knock
21 A down, B is suing. Now, that is direct testimony
22 of that disputed issue, the defendant saying, "No,
23 I stopped first and then I proceeded," and Plaintiff
24 A of course saying, "No, he continued and passed the
25 sign without stopping."

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2 Mr. Adler didn't see the vehicle pass the
3 stop sign, but he is competent to testify about the
4 circumstances from which a jury might draw a
5 reasonable inference that that is just what happened.

6 He might testify that as he was speaking with
7 me there came within his peripheral vision a white
8 Cadillac travelling about, well, it is 65 miles an
9 hour, pass behind him for a distance of about 150 feet,
10 that two or three seconds later he saw it again and
11 then saw the motor vehicle strike A, knocking A down.

12 Now you as a jury could draw from those
13 circumstances the reasonable inference, based on your
14 good common sense and your experience, that that motor
15 vehicle passed the stop sign without stopping. The
16 circumstances are that the motor vehicle was driving
17 at 65 miles an hour and traversed about 150 feet in
18 two or three seconds and that it would have been
19 quite impossible for him to have covered these 150
20 feet in two or three seconds had he stopped and then
21 proceeded.

22 So I say you may come to the same conclusion
23 by direct evidence as you may by indirect or circum-
24 stantial evidence and the law does not hold that one
25 type of evidence is better than the other type of

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2 evidence, the law says that at times circumstantial
3 evidence is of a better quality and that at other
4 times direct evidence is of a better quality.

5 The law requires the Government to prove its
6 case on both the direct and the circumstantial
7 evidence.

8 Now I have used the term "inference" when I
9 referred to circumstantial evidence and I used the
10 term "presumption" when I referred to the presumption
11 of innocence.

12 There is a difference.

13 An inference is a conclusion which the jury
14 may make based on good common sense and experience;
15 the example of that, of course, is arriving at a
16 determination of a disputed fact from circumstantial
17 evidence.

18 A presumption, on the other hand, is a
19 conclusion which the law requires the jury to make
20 and it continues until and only if proof to the
21 contrary is shown by proof beyond a reasonable doubt,
22 and of course the example of that is the presumption
23 of innocence.

24 What is the evidence in the case? It is the
25 sworn testimony of all the witnesses regardless of

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2 who called the witness. It is not based on the
3 number of witnesses each side called, it is based
4 on the quality of the testimony that is offered.

5 It is the exhibits received in evidence
6 regardless of who may have introduced them. It is
7 the facts which have been stipulated to, and there
8 was a written stipulation entered into. There may
9 have been other stipulations entered into between the
10 lawyers on the record but I don't recall that.

11 It is also the facts which have been judicially
12 noticed by the Court. In other words, at times I
13 said that a certain date of the month fell on a
14 certain day of the week, that is a judicially noticed
15 fact.

16 It may be helpful for you to know what is not
17 evidence.

18 One, the statements counsel made in the open-
19 ings and the statements or arguments counsel made
20 in summations -- and of course, that includes their
21 recital of the testimony, at times they recited from
22 their own recollections. Well, that is not evidence.
23 The evidence is what you heard, not what they heard.

24 The openings served a very useful function, they
25

1 alerted you to what was to follow. As one lawyer
2 pointed out, the evidence does not come in any set
3 pattern, any chronological order, and so if you
4 know the theories of the parties you can more easily
5 follow that testimony.
6

7 Summations, on the other hand, are intended to
8 focus attention on what the lawyers regard as the
9 important parts of the evidence in the record and of
10 theories of inculpability, which were offered by
11 Mr. Kimelman -- which mean theories of guilt -- and
12 theories of exculpability which were offered by each
13 of the defendants -- which mean their arguments to
14 show that their clients are not guilty -- or, as I
15 like to put it, the failure of the Government to
16 prove the guilt of the defendant.

17 Matters stricken from the record are not a
18 part of the record, and so if I directed the
19 reporter to physically strike it from the court
20 record you are to figuratively strike it from your
21 memory and recollection.
22

23 (Cont'd on next page.)
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Any random remark you may have heard in the courtroom is not a part of the record, just disregard it. If I made a statement, it is not evidence, just disregard it, and while I am at it, if I asked a question, it should have no greater significance to you than any other question asked; if you thought it was a silly question, disregard it, don't hesitate at all. The only reason I ask a question is that at times I may find there is something a little fudgy and uncertain in my own mind and I assume; if it is so in my own mind then it is probably in your mind, so I ask the question. It may be perfectly clear to you but it was confusing to me. I did not ask it because I wanted to bring out a particular bit of evidence.

There are times that the Court sustained objections to questions. You may not speculate on what the answer might have been if I had permitted the witness to answer. The point is I ruled as a matter of law that it should not be in this case and it is not in the case.

There are times that a lawyer asks a question and incorporates a statement in the question that wasn't supported in the record and the witness answered no. Well, you cannot assume that what the lawyer said

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2 was true just because the lawyer incorporated that
3 statement in the question. You see, lawyers test the
4 credibility of witnesses and they may put questions to
5 the witnesses that do not have support in the record.
6 It is a way of testing credibility and is perfectly
7 proper.

8 I might say that in cross-examining a character
9 witness Mr. Kimelman asked, "Have you heard that Mr.
10 Bermudez was arrested on a marijuana charge?"

11 The two witnesses who came as character
12 witnesses said no. Well, that was offered for a
13 very specific purpose, first to see what the witnesses
14 knew about Mr. Bermudez' general reputation, and if
15 the witnesses had answered in the affirmative, to
16 determine whether it affected his character. If the
17 witness said no, you may not assume in any way that he
18 was arrested, there is no proof in the record that he
19 was.

20 You, the jurors, are the sole judges of the
21 credibility of the witnesses, which means the believe-
22 ability of their testimony and the weight their
23 testimony deserves. Scrutinize the testimony given
24 and the circumstances under which each witness
25 testified and every matter in evidence which tends
to show whether a witness is worthy of belief. Con-
sider each witness'

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2 intelligence, language difficulty, the witness'
3 demeanor on the witness stand. Did he answer fully,
4 forthrightly? Was he evasive?

5 In that connection, of course, you understand
6 that where a witness is directed to answer yes or no
7 there are difficulties sometimes in answering yes or
8 no. Use your good common sense on that. The lawyers
9 have a right to control the cross-examination, there
10 is nothing wrong with that. If witnesses were allowed
11 to talk on and on on everything they like to say, you
12 recognize that we would have pure chaos. So the control
13 of cross-examination by counsel is very important for
14 an orderly presentation of the case.

15 Take into consideration the witness' ability
16 to observe the matters as to which he has testified,
17 whether he or she shall have impressed you as having
18 an accurate recollection of these matters.

19 Take into consideration the relation each
20 witness might bear to either side of the case, the
21 manner in which each witness might be affected by the
22 verdict, the extent to which the witness is corroborated
23 supported, that means, and the extent to which a witness
24 is contradicted by other evidence in the case.

25 I cannot recall whether a witness was faced

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2 with a prior inconsistent statement during this trial,
3 and that is what we call impeaching a witness, which
4 means that a lawyer may ask a witness whether at a
5 previous time he made a statement that is different
6 than the testimony he gave before you. Well, as
7 jurors, you decide whether the prior statement was
8 inconsistent with the testimony, you decide whether it
9 was just a normal variation in retelling the story,
10 you decide whether it is inconsistent as to a
11 material matter, then you determine the effect the
12 prior inconsistent statement has on the credibility
13 of that witness.

14 We had a number of expert witnesses, one was
15 Special Agent Abbott and the other two were chemists,
16 Mr. Weber and Mr. Sawinski. They expressed an opinion
17 as to what a particular substance was. Now normally,
18 witnesses, lay witnesses, may only tell the jury what
19 they saw or heard. A lay witness cannot say to you,
20 for example, "I think," or, "It probably is," or "It
21 probably was." That is an opinion, that is a con-
22 clusion. But exceptions to that rule exist as to
23 those whom we call expert witnesses. These are wit-
24 nesses who, by education and experience, have become
25 expert in some art, science, profession or calling.

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2 Such a person may state an opinion as to relevant and
3 material matter which they profess to be experts in,
4 and they may also state their reasons for the opinion,
5 as Mr. Weber and Mr. Sawinski spoke about the
6 experiences they both had in analyzing cocaine as
7 chemists.

8 Mr. Abbott said he had some instruction, as I
9 recall, at some Drug Enforcement Administration
10 School, or it may have been the agency that preceded
11 that agency; and then he said that throughout his
12 work, through his experience, he was able to express
13 an opinion as to what a particular substance was.

14 Now, the mere fact that I determined that a
15 witness is qualified to express an opinion doesn't
16 mean you have to take that opinion. You can disregard
17 it if you feel he wasn't qualified and that he shouldn't
18 even have come before you. I don't pass on the
19 weight of the testimony, I just determine whether you
20 should see it at all and you determine whether you
21 will give the expert opinion any weight. The expert
22 witness' opinion should be weighed, and you weigh it
23 just like any other testimony. All the factors I
24 have just suggested to you concerning weighing the
25 credibility, the believability of witnesses, applies
to expert witnesses, of course.

1 While we are on the question of expert
2 witnesses and while their testimony relates to
3 substances that were admitted into evidence, I
4 charge you that you may consider the circumstantial
5 evidence concerning the substances that were admitted
6 into evidence and the substance that Special Agent
7 Abbott testified to concerning Count Two on November 20,
8 1973. As circumstantial evidence you may consider
9 the price paid, if you credit the testimony, or the
10 price negotiated, the use of code names, the surrepti-
11 tious manner in which the parties negotiated, the
12 surreptitious and secret manner, if you believe it
13 was, in which their meetings were conducted. All of
14 these are circumstances that you may consider in
15 arriving at a determination on what the substance is.
16 In other words, the Government must prove that the
17 substance was cocaine and prove it beyond a reasonable
18 doubt. But that proof does not require, and it is not
19 essential to support a determination that the substance
20 was cocaine, that expert opinion be presented; you
21 can make such a determination based on all the
22 evidence in the case.
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(Cont'd on next page.)

Charge of the Court

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2 In this case, the defendant Bermudez and the
3 defendant Diaz-Martinez took the stand and testified.

4 A defendant who wishes to testify is competent
5 as a witness. You must judge the credibility of his
6 testimony in the same manner as any other witness.

7 The defendant Jorge Vivas did not take the stand.
8 The law does not compel a defendant in a criminal case
9 to take the witness stand and testify. No presumption
10 of guilt may be raised, and no unfavorable inference of
11 any kind may be drawn by the failure of a defendant to
12 testify.

13 A defendant who has been previously charged may
14 rely on the failure of the Government to prove its case.
15 It would be improper for you to discuss the failure of
16 the defendant Vivas to take the stand.

17 Now, Mr. Dias presented three witnesses as char-
18 acter witnesses: The Reverend Hipolito Melendez and
19 Alcira Gaitan and Mercedes Gaitan --

20 MR. MAHLER: Your Honor, those were Bermudez's
21 witnesses.

22 THE COURT: I am sorry. I am glad you told me.
23 And the jurors recall it better than I do. They were
24 shaking their heads.

25 Bermudez.

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2 Where the defendant has offered evidence of good
3 general reputation for truth and veracity or honesty
4 and integrity, or as a law abiding citizen, the jury may
5 consider such evidence in the case. Evidence of the
6 defendant's reputation inconsistent with those traits
7 of character ordinarily involved in the commission of
8 the crime charged may give rise to a reasonable doubt,
9 since the jury may think it's improbable that a person
10 of good character and with respect to those traits
11 would commit such a crime.

12 Now, Manuel Fiffe and Luis Felipe-Miranda testi-
13 fied that they participated in the crime charged. They
14 do not become incompetent to testify in the trial be-
15 cause they say they participated in the crime charged.
16 They are classified as alleged accomplices.

17 The testimony of an alleged accomplice alone, if
18 believed by the jury, may be of sufficient weight to
19 sustain a verdict of guilty, even though not corrobo-
20 rated, or supported by other evidence.

21 Now, whether or not their testimony is corrobo-
22 rated or supported by other evidence is a question for
23 you to decide. But I am Charging that even if Fiffe's and
24 Miranda's testimony as alleged accomplices is not corrob-
25 orated or supported by other evidence, their testimony

Charge of the Court

alone is enough to support a verdict of guilty. However, the jury should keep in mind that such testimony is always to be received with caution and weighed with great care. Their testimony is not to be considered by you as you might consider any ordinary layman's testimony. You must recognize that they say they participated in the crime charged. You should never convict a defendant upon the unsupported testimony of an alleged accomplice unless you believe such unsupported testimony to be true beyond a reasonable doubt.

Mr. Miranda was convicted of a felony. That means he was convicted of a crime that is punishable by a prison term of more than one year. A prior conviction does not render a witness incompetent to testify, but is merely a circumstance which you may take into consideration in determining the credibility of the witness. It is the province of the jury and the jury alone to determine the weight to be given to the prior conviction.

If a witness is shown to have testified falsely as to a material fact knowingly, you may disregard all that witness' testimony, on the theory he is unworthy -- he or she is unworthy of belief. On the other hand, the jury has discretion to accept the portion of that witness' testimony that the jury believes is credible. That

Charge of the Court

principle underscores the wide discretion the jury has in weighing the credibility of witnesses.

Evidence was offered of the seizure of certain substances and equipment pursuant to a search warrant, from the home of Jorge Vivas on June 14, 1974.

Now, I charge you that as a matter of law it was after the Conspiracy terminated, and is not chargeable in any way against the defendant Bermudez, or Diaz-Martinez. And it's offered for a very limited purpose against the defendant Vivas. You are not to be concerned as to whether the equipment, the substance was evidence of another crime. The only purpose it's offered, if you find it credible, and you find it relevant to the issue, is to determine whether it is some proof that the defendant Vivas entered into the Conspiracy charged in this indictment, and for no other reason.

There was also some proof and some discussion on the obligation, putting it in the negative, or impropriety of a lawyer going over testimony with witnesses he calls to the witness stand. I Charged you during the trial that it is improper for a lawyer to suggest in any way what a witness should testify to. In other words, tell him the testimony the lawyer wants.

It is perfectly proper for a lawyer to ask a witness

Charge of the Court

what he knows about the case, to go over that testimony with the prospective witness, to go over it in question and answer form.

And it's my opinion that a lawyer has the obligation of doing that to properly prepare for trial.

We turn to the Charge in the Indictment. Now, if you compare the Indictment with the Memorandum of Verdict, you will find other names mentioned. Well, the other names have been identified as Fiffe, Blanco and Miranda. The testimony is that Fiffe and Miranda pleaded guilty. There is no evidence in the record as to why Blanco is not before you. And that's not for your consideration. It's not your concern.

The defendants before you are Bermudez, Vivas and Martinez. And the question before you is whether the Government proved the guilt of the defendant by proof beyond a reasonable doubt. But I will read the indictment in its original form, and you will have it before you.

Count One says:

"On or about between the 31st day of October, 1973, and the 1st day of May, 1974, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants Eduardo Bermudez, Jorge

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2 Vivas also known as Jorge Posos, Israel Diaz-Martinez,
3 Manuel Fiffe also known as Pfiefel, Victor Blanco also
4 known as Red, and Luis Felipe Miranda, together with
5 Juanita Diaz also known as Jenny, herein named as a co-
6 Conspirator but not as a defendant, and other, did know-
7 ingly and intentionally conspire to violate Section 841
8 (a) (1) of Title 21, United States Code.

9 "1. It was a part of said conspiracy that the
10 defendants and co-conspirators would knowingly and in-
11 tentiously distribute and possess with intent to dis-
12 tribute cocaine hydrochloride, a Schedule II narcotic
13 drug controlled substance.

14 "2. It was further a part of said Conspiracy that
15 the defendants and co-Conspirators would conceal the
16 existence of the Conspiracy and would take steps designed
17 to prevent disclosure of their activities," in violation
18 of Title 21, United States Code, Section 846.

19 Now, I think I am at liberty to tell you that Two,
20 Three, Four and Five are excised because they don't refer
21 in any way to these three defendants, but they do refer
22 to Fiffe, Blanco and Miranda. And that's why those
23 numbers are missing.

24 Count Six:

25 "On or about the 20th day of November, 1973, within

1
2 the Eastern District of New York, the defendants Eduardo
3 Bermudez, Jorge Vivas, also known as Jorge Posos, Manuel
4 Fiffe, also known as Pfiefel, and Victor Blanco, also
5 known as Red, did knowingly and intentionally possess
6 with intent to distribute approximately one-half kilogram
7 of cocaine hydrochloride, a Schedule II narcotic drug
8 controlled substance," in violation of Title 21, United
9 States Code, Section 841(a)(1), and Title 18, United
10 States Code, Section 2.

11 Now, the reference in the Indictment to Title 21
12 and Title 18:

13 Title 21 is captioned Food and Drugs. And Title
14 18 is Crimes and Criminal Procedure.

15 The Congress determines what is a crime. And
16 on October 27, 1970, the Drug Abuse Prevention and Control
17 Act of 1970 became law. And it became effective May 1,
18 1971.

19 The Congress as a matter of policy established
20 certain strict controls for the supervision of the
21 importation, manufacture, transportation, sale and dis-
22 tribution of certain drugs.

23 Section 812 of Title 21 established certain
24 Schedules. Cocaine hydrochloride was incorporated in
25 Schedule II. Schedule II established the Schedule on

Charge of the Court

these findings.

"The drug or other substance has a high potential for abuse.

"The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use, with severe restrictions.

"Abuse of the drug or other substances may lead to severe psychological or physical dependence."

Under Schedule II(a)(4), it describes the following:

"Cocoa leaves and any salt, compound, derivative, or preparation of cocoa leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances."

(continued on next page.)

1
2 And I charge you that cocaine hydrochloride
3 comes within that definition.

4 Congress also provides under Section 841(a)
5 of Title 21 the following:

6 It shall be unlawful for any person knowingly
7 or intentionally to possess with intent to distribute
8 a controlled substance.

9 That is a section upon which Count 6 is based.
10 It's called the substantive count.

11 Count 1, however, is a conspiracy count. And
12 in very brief language, Section 846 describes the
13 conspiracy.

14 It says, "any person who attempts to or conspires
15 to commit an offense defined in this subchapter"
16 violates the section.

17 There is a difference in concept between a
18 conspiracy and what we call a substantive count, violating
19 a specific prohibition, 841, you shall not possess
20 with intent to distribute cocaine, and the conspiracy
21 section which says, it's a violation of law to conspire
22 to enter into a conspiracy to violate the law.

23 You see, that is a general term. So we call
24 it the conspiracy statute, what the law condemns and
25 proscribes, prohibits in a conspiracy is the entering

1
2 into the agreement.

3 It is not necessary for the Government to prove
4 that an accused actually possessed cocaine in the
5 charge of conspiracy to possess cocaine. While the
6 substantive count that charges possession of cocaine
7 with intent to distribute, it's vital to the Government's
8 case to prove that the accused possessed the cocaine.
9 It is just a slight variation of that, when I come
10 to the substantive counts, I will charge you on aiding
11 and abetting, the possession with intent to distribute.
12 But let's deal with the conspiracy count.

13 What is a conspiracy? It's an agreement. It's
14 an understnading. It's been properly described as a
15 criminal venture similar to a commercial venture. It's
16 an agreement between two or more to commit an unlawful
17 act. Those who are members of the conspiracy are called
18 conspirators.

19 A conspirator is a kind of partner in the
20 enterprise. A conspiracy is a partnership in a criminal
21 venture in which each member becomes the agent of
22 every other member.

23 Mere association, the being together of two
24 people, the mere similarity of their conduct does not
25 make for a criminal conspiracy. People have a right

1
2 to assemble to discuss matters. If you find one party
3 to have been a member of a conspiracy, the mere fact
4 that the accused associated with that member is not
5 enough. The mere fact that an accused was present
6 at the time the conspiracy was in operation and even
7 knew of the conspiracy is not enough.

8 You'll see that it is necessary for the
9 Government to prove beyond a reasonable doubt that the
10 accused participated, in some way entered the
11 conspiracy, promoted the business of the conspiracy
12 before you can say that an accused became a member of
13 the conspiracy.

14 More than that, the Government must prove beyond
15 a reasonable doubt that that activity, that that
16 participation was knowing and willful.

17 In other words, that the accused was aware that
18 the parties were dealing in cocaine. And that knowing
19 that the parties were dealing in cocaine voluntarily
20 and intentionally entered into the business, the
21 conspiracy, knowing that it was a violation of law.

22 The Government doesn't have to prove that the
23 defendant knew this specific section of law that was
24 violated, but knew that it was a violation of law to
25 deal in cocaine. It is not necessary for the Government

to prove that the parties sat down and entered a formal agreement; that the parties knew all the methods that the business was to use in order to succeed to accomplish the purpose. It is not necessary for the Government to prove that the conspirators knew one another. All that must be proved is that the members in some way or some manner -- and it could be the manner in which they dealt -- the Government must prove beyond a reasonable doubt that the members of the conspiracy in some way or some manner or through some contrivance positively or tacitly came to a mutual understanding to try to accomplish the unlawful scheme or plan, in this case, the dealing in narcotics.

What the evidence in the case must establish beyond a reasonable doubt is that the conspiracy was knowingly formed; that the parties to the conspiracy were aware that they were dealing in cocaine, and that one or more of the means or methods described in the indictment were agreed upon to be used in an effort to accomplish that purpose.

In order to bring an accused into the conspiracy, once the Government proves the conspiracy as alleged in the indictment is established, the Government must prove beyond a reasonable doubt that the accused

Charge

knowingly and willfully entered into that conspiracy; that knowing the unlawful plan, that he advised, assisted or does something that aids the conspiracy in its business.

Now, one who knowingly and willfully joined an existing conspiracy is chargeable with all the activities of the conspiracy from the beginning.

In determining whether a conspiracy existed, the jury should consider the actions of all the alleged participants. However, in determining whether a particular accused became a member of the conspiracy, you may consider only that accused acts and statements. In other words, if the witness Fiffe testified he spoke with Miranda or Mr. Blanco and one of the accused names were mentioned or his activities described, you may not use that testimony to determine whether the accused entered into the conspiracy. And you shouldn't confuse that with what I charge you on statements made outside the presence of the accused.

You see, criminal liability is a personal liability. The Government must prove by the testimony of what a defendant himself said or did by proof beyond a reasonable doubt in order to bring a defendant into the conspiracy. Now, once he is brought into the

Charge

1
2 conspiracy, then anything another member of the
3 conspiracy says or does during the term of the conspiracy
4 and to promote the cocaine business is chargeable against
5 that accused.

6 If you think about it, you will understand the
7 fairness. They are two separate and distinct principles.
8 One is a question of how to deal with the evidence.
9 The other is a question of whether a defendant is a
10 member of the conspiracy. You cannot charge the
11 accused with acts or statements outside his presence,
12 of which he knows nothing unless and until you first
13 find that he was a member of the conspiracy. And
14 that in turn depends on whether the testimony supports
15 proof that he entered into the conspiracy, which is
16 another way of saying, testimony of what that accused
17 said or did.

18
19 (Continued on next page)

20 M. fls.
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2 THE COURT: (Continuing.) We talk about
3 conspiracy, we might think of three partners in some
4 business all doing pretty much the same work and
5 sharing equally in the profits.

6 Well, not every legitimate partnership is
7 structured that way. There are partnerships in
8 which there are executives; then you have some
9 partners who are almost like stockholders and we
10 call them limited partnerships.

11 The kind of conspiracy charged here was
12 described as a chain conspiracy. Mr. Kimelman
13 described it and by repeating what he said, it is not
14 intended to give any substance whatsoever or support for
15 his summation or his argument. It is only to
16 describe the type of conspiracy described in this
17 indictment. He described Mr. Fiffe's participation
18 as a distributor, working under the boss of the con-
19 spiracy, Diaz-Martinez; Miranda was a delivery boy and
20 Bermudez and Vivas were suppliers and that Blanco was
21 an intermediary of some kind, a broker, possibly, and
22 that Juanita Guzman, also known as Diaz, kept the
23 cocaine in her apartment and packaged it.

24 In a chain conspiracy different participants
25

1
2 operate at different levels. It is not necessary
3 to prove that the accused knew every level of
4 operation or knew the identity of the individuals
5 performing those duties..

6 It is necessary for the Government to prove
7 that each one in the chain of operation in a chain
8 conspiracy understood that the success of the business,
9 of the conspiracy, depended on each one performing his
10 duties.

11 When the conspiracy terminated is a fact
12 question for the jury. I found as a matter of law
13 that it had already terminated by June 14, 1974. So
14 I instruct you that you cannot find a conspiracy
15 existed on or after June 14, 1974. The important
16 thing is that once the conspiracy terminates then the
17 business is over, then one partner can no longer
18 speak for another. It is only during the period
19 of the conspiracy.

20 In order for the Government to sustain the
21 charge in Count One, the conspiracy charge, the
22 Government must prove all the following essential
23 elements of the crime of conspiracy:

24 One: That the conspiracy described in the
25 indictment was wilfully formed and existing at the

Charge

1
2 time alleged for the purposes alleged in the indict-
3 ment, to wit, to knowingly and intentionally distri-
4 but and possess with intent to distribute, cocaine
5 hydrochloride;

6 Two: That the accused knowingly and willfully
7 entered into the conspiracy. And I told you that that
8 means that the Government must prove beyond a reason-
9 able doubt that he was aware of what the business of
10 the conspiracy was and being aware of the conspiracy
11 voluntarily and intentionally took part, participated
12 in it, knowing that it was a violation of law;

13 Three: That one of the conspirators, thereafter,
14 knowingly committed an overt act and that means that
15 one of the conspirators, one of the members of the
16 conspiracy, aware of what he was doing, committed
17 an overt act.

18 An overt act is something that is visual or
19 something that you can hear. It does not necessarily
20 mean that it must be a criminal act. The Government
21 does not have to prove an actual sale. It could be
22 as innocent as or innocent looking or appearing like
23 making a telephone call but if the telephone call is
24 to call a customer or to arrange for a negotiation
25 for a sale and it was done while the co-conspirator

1
2 was aware of what he was doing, then it was an act
3 performed by a co-conspirator, a knowing act, and;

4 Fourth: That such overt act was knowingly
5 done and in furtherance of some object or purpose
6 of the conspiracy as charged and again that means
7 that not only must it be done knowingly but it must
8 be something to further the business of the conspiracy.

9 Count Six charges the defendants Bermudez and
10 Vivas with possession of a half a kilo of cocaine
11 hydrochloride.

12 The Government must prove beyond a reasonable
13 doubt that the accused was in possession of approxi-
14 mately a half kilogram of cocaine hydrochloride, the
15 Government does not have to prove the exact amount;

16 Two, that the possession was knowing and
17 intentional and with intent to distribute. In other
18 words, that it is the criminal intent that the
19 Government must prove: first that the accused knew
20 that the substance was cocaine and, of course, vital
21 to that the Government must prove beyond a reasonable
22 doubt that the substance was cocaine; and that the
23 defendant or the accused knew that he was in possession
24 of cocaine, and that it was possessed with intent to
25 distribute. That means that it was not for personal
use, that it was for purpose of sale.

Charge

Now, the law recognizes two types of possession; actual and constructive possession. A person who knowingly has direct physical possession of an article has actual possession.

As I hold my glasses, they are in my direct control, that is actual possession. A person who although not in actual possession knowingly has both the power and intention at a given time to exercise dominion or control over a thing either directly or through another person or persons is then in constructive possession of it.

For example, if my glasses were in my chambers or at the optician and being repaired and I could direct the disposition of it, the return of it, the sale of it, the destruction of it then I have constructive possession.

Now, possession may be sole or joint. If I had the joint funds of Mr. Adler and myself, let us say \$100 belonged to us and I put it in my pocket, that would be joint possession and I would have actual possession and he would have constructive possession.

I charge you that conspiracy, a conspiracy charge is a charge that the accused entered into some agreement to perform an illegal act, while the

Charge

substantive charge is actually the illegal act.

In a case where two or more persons are charged with the commission of a crime, the guilt of any defendant may be established without proof that he personally did every act constituting the offense.

Section 2 of Title 18 referred to in Count 2, says in part as follows:

"Whoever commits an offense gains the use or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal. Whoever willfully causes an act to be done which if performed by him or another would be an offense against the United States is punishable as a principal."

In other words, every person who willfully participates in the commission of a crime may be found to be guilty of that offense.

Participation is willful if done voluntarily and intentionally and with specific intent to do something which the law forbids. In order to aid and abet another to commit a crime it is necessary that the accused willfully associate himself in some way with the criminal venture and willfully participate in it as he would in something he wishes to bring about. That is to say that he willfully seek by some

1
2 act or omission of his to make the criminal venture
3 succeed.

4 You, of course, may not find either defendant
5 guilty of aiding and abetting unless you find beyond
6 a reasonable doubt that every element of the offense
7 as defined in these instructions was committed by
8 some person or persons and that the defendant partici-
9 pated in its commission.

10 Now, that may be confusing. Every time I charge
11 in a conspiracy and I also charge aiding, I say, "I
12 hope it is clear in the jury's mind." It sounds very
13 much like some of the things I said when I talked about
14 the conspiracy.

15 The best way I can define it is on a theoretical
16 basis. In a conspiracy the substantive crime for which
17 the conspiracy has been established need not be proved.
18 It is the agreement between two or more plus an overt
19 act committed knowingly by one of the co-conspirators
20 in furtherance of the conspiracy.

21 In order to find someone guilty of aiding or
22 abetting, the Government must prove beyond a reasonable
23 doubt that that crime for which he is charged with
24 aiding and abetting was committed.

25 In this case, the Government must prove beyond

1
2 a reasonable doubt that the crime of possessing with
3 intent to distribute a half kilogram or about a half
4 kilogram of cocaine was committed. Otherwise, the
5 accused could not be found guilty of aiding and
6 abetting.

7 Now, you are about to be excused, you will be
8 going home. There are just a few more instructions
9 and I will excuse you for a few moments while I talk
10 to the lawyers.

11 Something was said about the future of the
12 defendants if you find them guilty. That is not your
13 concern at all. You just determine whether the
14 Government has proved its case beyond a reasonable
15 doubt. Punishment is up to the Court. So you are free
16 from that concern. Do not let it bother you.

17 The verdict must be a unanimous verdict. Each
18 juror must decide the case for himself or herself.

19 The jury verdict, the jury process is a
20 deliberative process, an exchange of ideas, a
21 discussion of the evidence. No juror has the right
22 to refuse to talk to his fellow jurors about the
23 evidence in the case. He violates his oath if he comes
24 to the jury room and says, "I have decided this case
25 and when you ladies and gentlemen agree with me you
will have a verdict."

1
2 He cannot take an intransigent position such
3 as that and neither does he have the right to abandon
4 his obligation to decide the case for himself. He
5 will violate his oath if he says, "Well, they call
6 me Goodtime Charlie or Goodtime Sue and I never argue;
7 when you agree on a verdict I will go along with the
8 majority." That is not right either.

9 You should discuss the evidence in the case
10 with a view to arriving at an unanimous verdict. If
11 you have arrived at a tentative verdict and after an
12 exchange of ideas and viewing the evidence you feel you
13 are wrong, you were wrong in the first place, do not
14 hesitate to take a different position.

15 During your deliberations you may have some
16 occasion to communicate with the Court and it will
17 all be done by your foreman. If you want to hear
18 any evidence in the case try to be specific, try to
19 give the subject matter, the witness, if you can,
20 direct or cross.

21 As I indicated, I will not give you the quick
22 response I would like to but I may be otherwise
23 engaged and I would have to release myself from that
24 and then find the material you want. I will read you
25

Charge .

1 20
2 what I think you want and nothing else. If you want
3 any of the exhibits ask for them. None will be sent
4 in without request.

5 If you want all exhibits, all exhibits will
6 go in. If you want specific exhibits, ask for them
7 and they will go in.

8 During your deliberations, I am not interested
9 in how you stand at any particular time. I am not
10 interested that you are six-to-six or eight-to-four
11 or eleven-to-one. I am interested in when you have
12 arrived at a unanimous verdict and when you have
13 arrived at a unanimous verdict the foreman will say,
14 "We have a verdict." Do not tell me what it is.

15 I will call you into the courtroom and ask
16 you to stand, Miss Foreman, and I will ask you, "How
17 do you find Eduardo Bermudez, guilty or not guilty?
18 How do you find Vivas, guilty or not guilty, or
19 Martinez, guilty or not guilty?"

20 Then I will go to Count 6, "How do you find
21 Bermudez, guilty or not guilty," etc. and you will render
22 your verdict. Then I will ask Juror No. 2, "Did
23 you hear the verdict rendered by your Foreman; is
24 that your verdict?" And so on up to 12. When everyone
25 has answered in open court and said, "Yes," then we

12

Charge

know it is the verdict of this trial and it becomes a verdict.

I would ask you to leave the courtroom for just a few moments, I want to talk to the lawyers and then I will call you back into the courtroom.

(The jury withdrew from the courtroom at 5:35 o'clock p.m.)

THE COURT: Judge Harold Stevens is in my chambers. I had an appointment with him at 5:30. I would like to go in and tell him that I have to come back and take some exceptions to the charge, if you have them.

Are there exceptions?

MR. KIMELMAN: I have no exceptions.

MR. MATARAZZO: I have no exceptions to the charge.

MR. MAHLER: I have two.

THE COURT: How long will you take?

MR. SUTTON: A few minutes.

MR. MAHLER: Just a couple of minutes.

THE COURT: Let me tell him I will be with him in five or ten minutes.

(After recess. Out of the hearing of the jury.)

MR. SUTTON: I respectfully suggest, your Honor,

11

Charge

1 and take exception to the charge with respect to
2 the expert that you had ruled as a matter of law
3 that these -- Mr. Abbott, the two chemists were
4 experts.
5

6 Could you expand as you did at the trial itself
7 where you said your opinion at the point as a matter
8 of law that they were expert has nothing to do with
9 whether they are experts and that's solely a fact
10 question which the jury has to consider and determine
11 based upon what they have heard in the evidence.

12 THE COURT: Anything else?

13 MR. SUTTON: I respectfully except to that
14 charge that circumstantial evidence, which you gave
15 three examples, would solely be a basis upon which to
16 find that the item under the conspiracy count was
17 cocaine.

18 I respectfully submit that the items that
19 you have given are not inclusive, not sufficient,
20 misleading and that in fact there must be a finding
21 that the item that they are charged with is in fact
22 cocaine and that they must find it was cocaine hydro-
23 chloride t-at they had the conspiracy about, that
24 the agreement as to the conspiracy charge was as to
25 possession to distribute the cocaine, if they find

Mr. Abbott could not in fact tell just by looking
or the tests he made and simply that --

THE COURT: This is the charge you want me to
give them.

MR. SUTTON: These are the objections I am
making; if you want I can give it to you. I didn't
write it down.

THE COURT: What you are saying is I didn't
charge them the Government must prove it is cocaine.

MR. SUTTON: It is my opinion that I don't
believe you have expressed sufficiently clearly --

THE COURT: Did I say the Government must
prove it is cocaine on the substantive count?

MR. SUTTON: Yes.

THE COURT: You are saying the Government must
prove this by expert testimony?

MR. SUTTON: As to the substantive count, yes.

THE COURT: It may not be proved by circum-
stantial evidence. Is that what you are saying?

MR. SUTTON: What I say is that the circum-
stantial evidence examples which you have given are
certainly not inclusive and I do say additionally
to that that these factors that you have given to
the circumstantial are not --

1
2 THE COURT: Anything else?

3 Go to the next thing.

4 MR. SUTTON: I except to your statement to
5 the jury where you told them you are not to concern
6 yourself why Blanco is not before you. I believe the
7 evidence is before you that Blanco pleaded guilty.
8 Mr. Vivas stated they made the same deal with
9 Miranda.

10 THE COURT: Is it true they said Blanco
11 pleaded guilty?

12 MR. KIMELMAN: The testimony to my recollection
13 is they all sat down with the lawyers and they all
14 decided to plead guilty but I don't believe there is
15 any testimony beyond that.

16 Mr. Blanco went ahead and pleaded guilty.

17 MR. MAHLER: I'd object to a charge like that.

18 THE COURT: If it is in the evidence why should
19 I not tell them Blanco pleaded guilty? I forgot
20 there was any testimony that he pleaded guilty.

21 MR. KIMELMAN: There is testimony that they
22 all sat down and decided to plead guilty.

23 THE COURT: I will tell them that. I don't
24 know how it will help you. If it is in the evidence,
25

1
2 I will tell them.

3 MR. SUTTON: What I have before me is you said
4 why Blanco was not before you.

5 THE COURT: You have won your point.

6 MR. SUTTON: I may withdraw the point.

7 THE COURT: You want to argue it and withdraw
8 it?

9 MR. SUTTON: There may have been a confusion
10 by the jury, this is the point I am trying to make.
11 I made a point on summation as to Blanco for testi-
12 monial purposes. You have taken this to mean about
13 Blanco for pleading purposes.

14 THE COURT: What do you want me to do? I said
15 I will tell them Blanco pleaded guilty. He is still
16 not before them. I will tell them Blanco pleaded
17 guilty because it is in the testimony.

18 Do you want that?

19 MR. SUTTON: May the --

20 THE COURT: Next point.

21 MR. KIMELMAN: Something came to my mind. You
22 also qualified, I believe, Special Agent Greenan as an
23 expert --

24 THE COURT: Greenan?

25 MR. KIMELMAN: Yes, as an expert to determine

1
2 these were implements used in the cocaine business,
3 the scissors from Mr. Vivas' house.

4 THE COURT: I am not going back over that.
5 I know I didn't.

6 MR. SUTTON: I except to your reading the
7 statute literally.

8 THE COURT: You don't want me to read it? They
9 shouldn't know it? Go ahead.

10 MR. SUTTON: You charged at one point that the
11 agreement was to be as to a criminal venture to commit
12 an unlawful act.

13 I would respectfully ask that the unlawful
14 act be the specific unlawful act of the intent to
15 possess, of the possession with intent to distribute
16 cocaine hydrochloride.

17 THE COURT: I read that at one point in the
18 charge.

19 MR. SUTTON: Another point you omitted and
20 there might be a confusion.

21 THE COURT: Go ahead.

22 MR. SUTTON: You spoke of a chain of conspiracy,
23 a chain conspiracy. I would respectfully submit that
24 it should -- these words should have been preceded
25 by the word, "alleged" chain conspiracy.

17

Charge

THE COURT: Next.

MR. SUTTON: I except to your charging with respect to your example on constructive possession using your glasses as the example.

It raises the question --

THE COURT: Should I have used your glasses?

MR. SUTTON: No.

It raises the question of ownership and therefore, there should be a charge that the defendants must be found beyond a reasonable doubt to own, to have owned the cocaine.

THE COURT: Next.

MR. SUTTON: That's all I have.

THE COURT: All the exceptions are denied except that I will charge them that -- I will remind that them Blanco pleaded guilty.

MR. MAHLER: I object to that portion of your charge concerning the weight to be given to the testimony of the co-conspirators and I request that you charge in the language of United States v. Padgett and United States v. Gonzalez.

THE COURT: Denied.

MR. MAHLER: I request a charge that the defendant Diaz is not charged with the possession

1 of any of the physical items which appear in front
2 of the jury on the Government's table.

3 THE COURT: Denied. That's another summation.
4 If I sum up for the defendant I will have to sum up
5 for the Government.

6 Didn't you tell that to the jury?

7 MR. MAHLER: No.

8 THE COURT: You should have done that.

9 MR. MAHLER: I ask your Honor to charge, as
10 the theory I have submitted to you in my second request,
11 to charge simply that the jury must find beyond a
12 reasonable doubt that the -- all the illicit acts
13 described are part of one conspiracy not portions of
14 two conspiracies.

15 THE COURT: No.

16 I wish I had the latest case but I don't have
17 time to look it up, where a judge charged he had to
18 charge on a single conspiracy and they said it was
19 too favorable.

20 Charges like that do nothing but confuse
21 jurors. If there is a case where the evidence fairly
22 would demonstrate multiple conspiracy I'd be glad
23 to do it.

24 Where it isn't there, I am not dragging in
25 unnecessary and confusing concepts. Our Court of

1 Appeals' judges have been struggling with it. I am
2 trying to figure out what they mean by it.
3

4 Anything else?

5 MR. MAHLER: This is a problem not a request
6 to charge. But we have submitted a copy of the
7 indictment and it, of course, lists Juanita Dias as
8 the name of the party known as Jenny.

9 THE COURT: That's why in my memorandum of
10 verdict I said Juanita Guzman, known as Juanita Diaz.

11 MR. MAHLER: I ask you to instruct the jury
12 as to what it is.

13 THE COURT: I said they determine fact
14 questions. I already told them that. They already
15 understand. I will do the right thing.

16 Call the jury in, please.

17 (The jury entered the court room at 5:46
18 O'clock p.m.)

19
20 (Cont'd next page.)
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(At 5:46 o'clock p.m., the jury took its place in the jury box.)

THE COURT: Members of the jury:

I told you that it wasn't your concern that Mr. Blanco wasn't before you. I think I also said that you don't know what happened with Mr. Blanco's case. I may have said something like that. But it was called to my attention that there is evidence that Mr. Blanco pleaded guilty in this case, and also evidence that Fiffe, Blanco and Miranda had been in communication with each other, when they offered the plea.

Now, I just remind you of that, so that you know there is evidence of Mr. Blanco's relationship to this case, and I had overlooked it.

But again, I say the action is United States of America against Eduard Bermudez, Jorge Vivas, and Israel Diaz Martinez, and your consideration is directed to the three defendants before you.

At this point, we will suspend now till tomorrow when you will come in again.

Don't talk about the case when you come in tomorrow, don't talk about the case. I will give you further instructions when you get in, I will call you into the courtroom. There are certain formalities that have to be complied with, and then, soon after

1 ten o'clock, you will start your deliberations.

2 Don't think about the case, don't talk about
3 it until tomorrow.

4 Please leave the papers that I gave you, the
5 Memorandum of Verdict, and a copy of Count 1 and 6
6 in the jury room. The jury room will be locked, and
7 you will find them tomorrow morning when you come in.

8 The jury is excused.

9 JUROR NO. 4: What time tomorrow?

10 THE COURT: Ten o'clock.

11 I am glad you asked me, you know that means
12 ten of ten and so forth. All right.

13 Ten o'clock tomorrow, if I am not in the court-
14 room I am going to be across the hall, I will be in
15 the other courtroom.

16 (The jury then left the courtroom.)

17 MR. MAHLER: May the record simply reflect
18 my exception to your refusal to charge?

19 THE COURT: All requests that are not granted
20 by the Court, are excepted to. The rights of the
21 defendants to review are specific, we understand that.

22 MR. MAHLER: Thank you.

23 (At 5:50 o'clock P.M., the session was concluded.)

24 * This is a certified
25 Manuscript of the
 Richard M. Maile

CHARGE

(At 5:02 p.m., out of hearing of the jury.)

THE COURT: The jury has sent a note out, "A written charge of what is a conspiracy." Mark that as a Court exhibit.

THE CLERK: Court Exhibit 11.

THE COURT: Any objection to submitting a written charge on definition of conspiracy to a jury?

MR. SUTTON: My instinct tells me to object.

THE COURT: How do you feel about it?

MR. MATARAZZO: No objection.

MR. MAHLER: I would like to see what the charge is.

THE COURT: Do you have any objection to a written charge given to the jury on conspiracy separate and apart from the rest of the charge.

MR. MAHLER: No.

MR. KIMELMAN: No.

THE COURT: I think it would be perfectly all right.

The only thing I don't have here is the charge.

I have another note, "Business cards of the record shop."

May I see what I said in the transcript?

Here is one business card.

MR. KIMELMAN: It is not quite clear.

2 1 THE COURT: It says business cards of the
2 record shop.

3 MR. KIMELMAN: One business card of the record
4 shop and one card in evidence with number and Jorge.

5 The number of the record shop.

6 THE COURT: Just send that in and see if they
7 are satisfied.

8 What exhibit is that going in as or what is the
9 number?

10 MR. KIMELMAN: 22.

11 THE COURT: Give it to the marshal.

12 THE COURT: If they want more, if they ask
13 questions tell them to put it on a note.

14 THE CLERK: Jury note marked as Court Exhibit 12.

15 THE COURT: I am going to try to talk them out
16 of this because I have an uneasy feeling that they
17 may look at this printed word and take a phrase. If
18 the whole charge were given to them I probably would
19 feel a little better about it but one part of the
20 charge I am a little concerned about.

21 (The jury entered the courtroom at 5:30 p.m.)

22 THE COURT: I would like to comply with your
23 request to give you a written charge on conspiracy but
24 I have certain fears about giving a written charge on
25 part of the charge.

3 1 I might emphasize that there might be one phrase
2 in it that you might hang onto. One juror might read
3 the charge and another juror might not. Here I know all
4 of the jurors will hear it. I would rather repeat or
5 practically repeat what I said before and fortunately
6 it has just come up from the court reporter and it has
7 not been collated so I will just read it and turn the
8 pages slowly so I don't upset the order.

9 "Count 1, however, is a conspiracy count. And
10 in very brief language, Section 846 describes the
11 conspiracy. It says any person who attempts to or
12 conspires to commit an offense defined under this
13 subject chapter violates the section. There is a
14 difference in concept between a conspiracy and what we
15 call a substantive count, violating a specific section,
16 841. You shall not possess with intent to distribute,
17 and the conspiracy section which says it is a violation
18 of law to conspire to enter into a conspiracy to
19 violate the law. You see that is a general term, so
20 we call it conspiracy statute. What the law condemns
21 and proscribes, prohibits in a conspiracy is entering
22 into the agreement. It is not necessary for the
23 Government to prove that an accused actually possessed
24 cocaine in the charge of conspiracy to possess cocaine.

1 While substantive count that charges possession of
2 cocaine with the intent to distribute, it is vital to
3 the Government's case that the accused possess cocaine.
4 It is just a slight variation of that when I come to
5 the substantive count, and I shall charge you on aiding
6 and abetting the possession with intent to distribute.

7 Let us deal with the conspiracy count. What is
8 a conspiracy? It is an agreement, it is an under-
9 standing.

10 It has been properly described as a criminal
11 venture similar to a commercial venture. It is an
12 agreement between two or more to commit an unlawful
13 act. Those who are members of the conspiracy are
14 called conspirators. A conspirator is a kind of a
15 partner in the enterprise. A conspiracy is a partner-
16 ship in a criminal venture in which the acts each
17 member becomes the act of every other member. Mere
18 association, the being together of two people, the
19 mere similarity of their conduct does not make for a
20 criminal conspiracy.

21 People have a right to assemble to discuss
22 matters. If you find one party to have been a member
23 of a conspiracy, the mere fact that the accused
24 associated with that member is not enough.

25 The mere fact that an accused was present at

5 1 the time the conspiracy was in operation and even knew
2 of the conspiracy is not enough. You will see that it
3 is necessary for the Government to prove beyond a
4 reasonable doubt the accused participated in some way,
5 entered the conspiracy, promoted the business of the
6 conspiracy before you can say that an accused became
7 a member of the conspiracy.

8 More than that, the Government must prove
9 beyond a reasonable doubt the activity, that that
10 participation was knowing and willful. In other words,
11 that the accused was aware that the parties were
12 dealing in cocaine and that knowing that the parties
13 were dealing in cocaine voluntarily and intentionally
14 entered into the business, the conspiracy, knowing
15 that it was in violation of law.

16 The Government does not have to prove that the
17 defendant knew this specific section of law was
18 violated but knew that it was a violation of law to
19 deal in cocaine. It is not necessary for the Govern-
20 ment to prove that the parties sat down and entered
21 into any formal agreement, that the parties knew all
22 the methods that the business was used in order to
23 succeed to accomplish the purpose. It is not necessary
24 for the Government to prove that the conspirators
25 knew one another. All that must be proved is that the

1 members in some way or manner, and it could be the
2 manner in which they dealt, the Government must prove
3 beyond a reasonable doubt that the members of the
4 conspiracy in some way or some manner or some contri-
5 vance, positively or tacitly came to a mutual under-
6 standing to try to accomplish the unlawful scheme or
7 plan, in this case the dealing in narcotics.

8 What the evidence in the case must establish
9 beyond a reasonable doubt is the conspiracy was know-
10 ingly formed, that the parties to the conspiracy were
11 aware that they were dealing in cocaine, that one or
12 more of the methods described in the indictment were
13 agreed upon in an effort to accomplish that purpose.

14 In order to bring the accused into the
15 conspiracy, once the Government proves the conspiracy
16 as alleged in the indictment is established, the Govern-
17 ment must prove beyond a reasonable doubt that the
18 accused knowingly and willfully entered into that
19 conspiracy, that knowing the unlawful plan, that he
20 advised, assisted or does something that aids the
21 conspiracy in its business.

22 Now, one who knowingly and willfully joins an
23 existing conspiracy is chargeable with all the
24 activities of the conspiracy from the beginning. In
25 determining whether a conspiracy existed, the jury

1 should consider the actions of all the alleged
2 participants; however, in determining whether a
3 particular accused became a member of the conspiracy,
4 you may consider only his acts and statements.

5 In other words, if the witness Fiffe testified
6 he spoke with Miranda or Mr. Bianco and one of the
7 accused's names were mentioned or his activities
8 described, you may not use that testimony to determine
9 whether the accused entered into the conspiracy and
10 you should not confuse that with what I charge you on
11 statements made outside the presence of the accused.

12 You see, criminal liability is a personal
13 liability. The Government must prove by the testimony
14 of what a defendant himself said or did by proof
15 beyond a reasonable doubt in order to bring a member,
16 a defendant, into the conspiracy. Once he is brought
17 into the conspiracy and here I don't have the copy,
18 once he is brought into the conspiracy then as a
19 partner of the conspiracy he is bound by any acts or
20 declarations of any member of the conspiracy made during
21 the time of the conspiracy and in furtherance of the
22 objectives of the conspiracy, and you must distinguish
23 between those two ideas: One, as an evidentiary
24 matter, how to deal with the evidence, but before you
25 treat the evidence in that fashion, you must find
that a defendant entered into the conspiracy,

1 was actually a partner, a member of the conspiracy
2 because until that time he is not bound by anything
3 that any member says outside his presence without his
4 knowledge.

5 Now I hope that clears it up. The jury is
6 excused.

7 (The jury withdrew at 5:40 p.m.)

8 THE COURT: I apologize, the last page was
9 hidden here. It is here with a note. Here is what I
10 said and I don't think it is different than what I just
11 told them. I said once he is brought into the
12 conspiracy then anything another member of the
13 conspiracy says or does during the time of the
14 conspiracy and to promote the cocaine business is
15 chargeable against that accused.

16 If you think about it you will understand the
17 fairness. There are two separate and distinct
18 principles: One is how to deal with the evidence and
19 the other is whether the defendant is a member of the
20 conspiracy. You cannot charge an accused of a
21 conspiracy outside of his presence of which he knows
22 nothing -- it should have been which he knows nothing,
23 unless and until you first find that he was a member
24 of the conspiracy and that in turn depends on whether
25 the testimony supports the proof that he entered into

1 THE CLERK: Note from jury marked Court Exhibit 19
2 for identification.

3 (Out of hearing of the jury.)

4 THE COURT: The note is: "Charge, what is a
5 conspiracy?"

6 I will make one more try at it. Apparently what I
7 told them before --

8 MR. SUTTON: Maybe if I get my briefcase I can
9 say something.

10 THE COURT: Apparently they don't understand it.

11 I read from the -- isn't this where I read directly
12 from the charge book?

13 I charged them in some of the language I usually
14 use. They wanted it in writing and instead I read it
15 to them. I will try to give it to them in layman's
16 language once more.

17 Seat the jury.

18 (The jury entered the courtroom at 3:51 p.m.)

19 THE COURT: Well, your last note asked me to
20 define conspiracy. I have given you a definition a
21 number of times and I will try again by saying it
22 differently, but, of course, always meaning the same
23 thing. It might be helpful to describe it by
24 distinguishing it.

25 When a defendant or an accused is charged with

1 doing something to violate the law, normally it is a
2 specific section. You are prohibited from doing some-
3 thing. When the charge is that the accused did some-
4 thing, that charge is, we call a violation, a
5 substantive violation and so in this case, in Count 6,
6 the defendant Bermudez and Vivas are charged with the
7 possession of cocaine. I indicated that type of
8 possession was the kind of possession that charged them
9 with dealing in it, and the possession was possession
10 with intent to distribute.

11 The statute says it is unlawful to possess
12 cocaine with intent to distribute, and, of course, I
13 am not giving you the full charge because the
14 Government has to prove that that possession was knowing-
15 ly and willfully, they are aware of it and that is one
16 type of a crime. That is a substantive offense.

17 What Congress makes a violation is the getting
18 together for the purpose of violating the law with
19 intent to violate the law, so that it isn't the
20 possession of the cocaine that is prohibited in 846,
21 though as I say that is a violation, but it is the
22 getting together for the purpose of dealing in cocaine
23 and the phrase used in the indictment is possession with
24 intent to distribute cocaine; but that is what is meant
25 by it.

1 Now, a conspiracy obviously takes two or more
2 people. That is a difference, another difference
3 between conspiracy and the substantive crime, because
4 it is a getting together. We call it an agreement.

5 The Government must prove that two or more
6 people and at least one of the accused got together
7 for the purpose of going into the cocaine business.

8 Now, I also charge you to make sure that the
9 Government's proof must show a conspiracy and not
10 people -- not just getting together and talking
11 about non-criminal activities. Make sure that the
12 accused didn't just happen to be there innocently
13 or by accident. Before you convict anyone for being
14 a part of the group that is dealing in cocaine, the
15 Government must prove that the party charged, the
16 accused, knew that what he was doing, his activity
17 if he sat down to talk to someone, if he got on the
18 telephone and talked about something, if he drove
19 in the car, if he sat down with a prospective buyer,
20 that he knew it was part of that group's activity
21 to deal in the cocaine.

22 Again, that it wasn't by pure accident.

23 When I talked about what the Government has
24 to prove beyond a reasonable doubt I pointed out
25 all the elements of conspiracy that the Government

1 has to prove:

2 One, that there was a conspiracy as charged in
3 the indictment. The conspiracy in the indictment
4 charges that first, the time -- it is on or about and
5 between the 31st day of October of 1973 and the 31st
6 day of May of 1974, and the purpose, again, as I say,
7 was to deal in cocaine.

8 The Government must establish that, by proof
9 of what all the alleged conspirators said and did,
10 as if you view their activities and found, from what
11 they said, and from how they said it, the way they
12 dealt with each other. Did the Government prove
13 beyond a reasonable doubt that they were in the
14 cocaine business? That is one element.

15 Number two, that the particular defendant, the
16 accused charged, knowingly and willfully entered into
17 that conspiracy. The proof through the testimony of
18 what that defendant did must show what he said or did.
19 Do you believe the testimony? Do you believe the
20 testimony? Does that testimony show beyond a
21 reasonable doubt that the accused was aware that what
22 he was doing was participating in the cocaine business,
23 not just accidental and he knew it was a violation of
24 law to deal in cocaine.

25 The third element, that thereafter one of the

1 members of the conspiracy, any member of the conspiracy,
2 knowingly and willfully committed an overt act and
3 that means did anything that was observable, that
4 was obvious for the purpose.

5 And then, the fourth element, the overt act
6 was committed in furtherance of the cocaine business.

7 If he took a ride, did he do it to negotiate
8 with a buyer, deliver cocaine, to collect the money,
9 to deliver the money?

10 And was that act in furtherance of the
11 conspiracy, the cocaine business?

12 So there is nothing mysterious about it. It
13 need not be a formal, express agreement. The Govern-
14 ment does not have to prove that all the members of
15 the conspiracy got together and understood and agreed
16 on everything about the conspiracy, and the Government
17 doesn't have to show that Mr. A was designated to do
18 this work and B to do this work, one to buy the
19 narcotics, the other to deliver it and the other to
20 sell it. The Government does not have to prove that
21 any of the members of the conspiracy knew one another.
22 But, what they do have to prove that the party to be
23 charged and the defendant understood that there were
24 others in the deal, in their group, carrying on this
25 business, and that in order for them to be successful

1 that everyone had to do their job. Someone had to get
2 the narcotics and someone had to package it and some-
3 one had to get the customers; and someone had to deliver
4 it. The Government must prove that the accused was
5 aware of that.

6 Now, as I say, if the Government proves all the
7 four elements essential to this crime beyond a
8 reasonable doubt then you must find the accused guilty.
9 If you find they have not proved all those elements,
10 then find them not guilty.

11 Again, I hope that I have explained it. I know
12 coming into court as a jury for the first time, it is
13 not an easy concept. But, we have been here now for
14 two weeks and this is the third or fourth time I
15 explained it to you and I hope I got it across to you.

16 The jury may be excused.

17 (The jury withdrew at 4:03 p.m.)

18 (Out of hearing of the jury.)

19 THE COURT: I will take exceptions to the charge.

20 MR. MAHLER: I take exception to the general
21 nature of the charge and I would like to request that
22 you charge the jury formally, the same exact manner as
23 you charged them originally.

24 THE COURT: The same language I gave them
25 three times.

4 Abbott-direct

or instigators of the conspiracy.

In determining whether or not a defendant or any other person was a member of the conspiracy, you are not to consider what others may have said or done. That is to say, the membership of a defendant or any other member of the conspiracy must be established by the evidence in the case as to his own conduct, what he himself knowingly said or did,

With that you may continue, Mr. Kimelman.

MR. KIMELMAN: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. KIMELMAN: (Cont.)

Q Special Agent Abbott, I ask you when and where you met Victor Blanco. Will you tell us again, please?

A I met Victor Blanco in his apartment at approximately 4:30 p.m. on October 31st, 1973.

Q Where is this apartment located?

A 97 Clinton Avenue, Brooklyn.

Q Who else was present at that time?

A With me?

Q Yes.

A An informant.

MR. STTON: I can't hear, your Honor.

THE COURT: Would you repeat the --

1
2 at that time?

3 MR. SUTTON: Objection.

4 THE COURT: Overruled.

5 THE WITNESS: Yes, there was.

6 Q What time did you get to Victor Blanco's
7 apartment?

8 A A little bit after 5 p.m. on November 2nd.

9 Q What happened as you entered the apartment?

10 A As I entered two people were leaving. I took
11 a seat. Shortly after this another individual entered the
12 apartment. Blanco introduced this individual to me as
13 Pfiefel.

14 Q Do you now know the real name of the individual
15 who was introduced to you as Pfiefel?

16 A Yes.

17 Q Tell us that name.

18 A Manuel Fiffe.

19 Q What happened after your introduction to
20 Pfiefel?

21 A Blanco and Fiffe had a conversation in Spanish.
22 And Fiffe handed me a package wrapped in a piece of brown
23 paper bag. I opened the brown paper wrapper and found a
24 plastic bag containing white powder. I opened the bag and
25 examined the white powder and I observed it to be low quality

1
2 cocaine.

3 I conducted some brief tests to determine the
4 presence of cocaine.

5 THE COURT: Where did you make these tests.

6 THE WITNESS: Right in Blanco's apartment.

7 THE COURT: In his presence.

8 THE WITNESS: Yes. They were not chemical
9 tests.

10 Q Will you tell us the test.

11 MR. SUTTON: I didn't hear him.

12 THE COURT: Mr. Barbella, would you repeat
13 that.

14 (Record read.)

15 THE WITNESS: One test was what we call a
16 burn test. You burn a small bit of the cocaine and
17 the amount of residue left behind indicated the amount
18 of impurities. The larger the residue the lower the
19 quality of cocaine.

20 The second test was looking for the numbness
21 after rubbing it on my hand.

22 And the third test I used was to place some
23 cocaine into a glass of water.

24 (Continued next page.)

time, two, three minutes, and handed me the official funds.

What did he hand you?

A I believe it was a total of \$750.

THE COURT: What are official funds?

THE WITNESS: Official funds are monies used for the purchase of evidence.

THE COURT: Are the numbers pre-recorded by someone before they are turned over to you?

THE WITNESS: Yes, they are.

THE COURT: All right, go ahead.

THE WITNESS: The informant gave me all of the official funds. I counted out \$680 and asked Blanco if he had two fives, change for ten, which he did, and gave it to me. And I then paid Fiffe \$675.

During the course of this transaction, the informant asked if he could leave. And I told him he could wait for me in the car.

After I paid Fiffe, Blanco asked me -- Blanco told me that Fiffe's people would have another shipment of cocaine coming in soon and if I would be interested in purchasing some more cocaine. I told him when the shipment came in, he should give me a call and we would take care of business from that point.

I then said good-bye to Fiffe and Blanco,

1
2 returned to the Government car where Agent Borst and
3 the informant were waiting for me, and drove out of
4 the area and met with Agent Dovetko and advised him
5 that I purchased an ounce of cocaine for \$675.

6 (Continued on next page.)
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MR. SUTTON: Objection. I move to strike.

THE COURT: Objection sustained.

Do you know what the custom and practice is at the laboratory on resealing envelopes after tests are made?

THE WITNESS: To my knowledge, they reseal the envelope.

THE COURT: Do you know that to be the custom and practice?

THE WITNESS: Yes sir.

THE COURT: All right.

Q In other words, then, with this additional seal does Exhibit 1 appear to you to be in the same condition as when you turned it in to the Northeastern Regional Laboratory?

A Yes.

Q Now, Special Agent Abbot, when was the next time that you had a conversation with Victor Blanco?

A I received a telephone call from Victor Blanco approximately 1:30 p.m. on November 8, 1973.

Q Could you tell us the conversation that you had with Victor Blanco?

A Blanco told me the people in the factory had a new shipment of uniforms and I should come down to look

at them.

Q When he said that to you, did you understand what he was talking about?

A Yes, I did.

Q Is that in fact some type of narcotics jargon that you are familiar with?

MR. MATARAZZO: Objection, leading the witness.

THE COURT: Overruled. I will allow it.

What other grounds, Mr. Sutton?

Mr. Matarazzo?

MR. MATARAZZO: I said he is leading the witness. He is suggesting --

THE COURT: Is that the same grounds?

MR. SUTTON: I withdraw my objection, your Honor.

THE COURT: Objection overruled.

Go ahead.

THE WITNESS: May I have the question again?

(Record read.)

THE WITNESS: Yes, it is.

Q Based on your experience, what did you take that statement to mean?

A Well, based on my experience and the last conversation I had with Blanco, it meant to me that the

shipment of cocaine was in and that I should examine it with a view toward purchasing another quantity of cocaine.

Q As a result of that conversation, what did you do?

A Well, Agent Borst and I arrived in the vicinity of Blanco's residence at about ten minutes to 3:00 that afternoon.

I went inside and Blanco asked me if I wanted to see the cocaine. I told him I did.

MR. MAHLER: Judge, at this time I am going to make my motion to preclude any evidence concerning this particular statement being offered in evidence.

THE COURT: On what grounds?

MR. MAHLER: The grounds we previously discussed concerning my bill --

THE COURT: Objection overruled.

THE WITNESS: Blanco and I went downstairs and met Agent Borst in the government vehicle. I introduced Blanco to Agent Borst. And Blanco directed us to a corner store.

THE COURT: When you say government vehicle, did it have any insignia on it or any writing on it to indicate that it was a government vehicle?

THE WITNESS: No sir. It was used as an under-

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Abbott-direct

253

A Red is the nickname for Victor Blanco?

Q How did you know that?

A He's a redhead.

Q Is that a name that you came up with or had you heard someone else term him with that?

A The informant told me that was his nickname.

Q All right. Now, they got into the government car, this Volkswagen, and where did you go?

A We proceeded to the vicinity of 293 Grand Street, Brooklyn, New York.

Q What happened when you got there?

A When we got there -- to Havermyer and Grand Street, Blanco instructed Agent Borst to pull over and apologized for -- he said Agent Borst would have to wait in the car. And he apologized for this.

Blanco and I got out of the government vehicle and walked around the corner and entered a clothing store located at 293 Grand Street.

Q Now, could you describe the clothing store for us? What did it look like on the outside?

A A street level store with the -- the front was with all glass window panes.

Q Did it have any sign above it?

A Yes, it did.

1
2 Q Do you recall what the sign said?

3 A Clothing Center.

4 Q What type of clothing did you observe being
5 sold?

6 A Men's wearing apparel.

7 Q Now, you entered the store. Then what happened?

8 A WE entered the store and Manuel Fiffe was
9 behind the counter. So I waved to him as a greeting. And
10 Blanco and Fiffe had a conversation in Spanish. After a
11 few minutes Fiffe, Blanco and I proceeded through a partition
12 in the back room of the store.

13 We got inside and Fiffe took out a small
14 aluminum package from his sock and opened it up for me to
15 look at. And I observed about a quarter of an ounce of
16 cocaine inside.

17 And Fiffe spoke to Blanco. Blanco told me
18 that this was a sample of the shipment that had come in.

19 I looked at the cocaine and I told Blanco,
20 this is much better than the ounce I had purchased and I
21 was satisfied with this.

22 Q How did you make that determination?

23 A It appeared to be of a higher quality than the
24 outside purchase.

25 MR. SUTTON: I didn't hear that.

Abbott-direct

11 2 you what Blanco said, that Fiffe was only the front man, what
3 did you say then?

4 A I said if he can't lower the price he can't
5 lower the price. I will take the package anyway.

6 I instructed Fiffe with a motion of my hand to
7 wrap up the package.

8 I put the cocaine back in the plastic bag,
9 resealed it. At this point, I reached in my pocket for a small
10 scale and Fiffe took out a small postage scale, put the
11 package on it and spoke to Blanco.

12 Blanco said, "Four and a half ounces. Right?"

13 I said, "Yes, that is it, four and a half ounces."

14 Q Did you observe the cocaine being weighed?

15 A Yes, I did.

16 Q Did you see that it weighed four and a half
17 ounces on that scale?

18 A Yes, I did.

19 Q Now, will you tell us again --

20 MR. KIMELMAN: Strike that.

21 Q How much is four and a half ounces in kilograms?

22 A In kilograms, it would be a one-eighth kilo or
23 a hundred and twenty-five grams.

24 Q Now, after this cocaine was weighed, what
25 happened?

Abbott-direct

12 A Fiffe said, "Money."

THE COURT: Of course, a kilogram means one thousand grams, doesn't it?

THE WITNESS: That's correct.

THE COURT: One-eighth of a thousand is a hundred and twenty-five grams?

THE WITNESS: That is correct.

A (continuing) Fiffe said, "Money."

And I told Blanco to tell Fiffe that the money was with my partner upstairs in the car, and he should come upstairs and he would pay him.

He agreed to this. I put the package in my pocket and all three of us went upstairs.

Q When you went upstairs, did Mr. Blanco ask you anything?

(continued on next page)

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Abbott-direct

MR. KIMELMAN: Strike that question.

Q Was there any discussion about further shipments?

A Yes. When would I be interested in purchasing something else.

Q And how did you respond?

A I told him when another shipment came in to give me a call and I would come down and look at it.

Q Now, when you got upstairs -- I take it you had to go up through the trap door again?

A Yes.

Q When you went upstairs what happened?

A Mr. Blanco, Fiffe and I entered the front part of the store where the clothing was and motioned to Fiffe to come out to the car. And he followed me out.

Q Well, where did you go?

A We went to the Government car where Agent Borst was waiting for us.

Q Now, when you got outside the store did you observe anybody inside the store?

A On my way out I observed some people in the store.

Q Have you since identified the people you observed in the store?

A Yes, I have.

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Abbott-direct

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Q Can you tell us who those people are?

3

A Well, Mr. Diaz was still in the store as I was going out. And I observed another individual lounging at the cashier's counter.

5

6

Q Have you subsequently identified and do you now know that individual's name?

7

8

A Yes, that is Louis Miranda.

9

Q And Mr. Diaz and this individual that you now know as Louis Miranda were in the store as you left it with Mr. Fiffe?

10

11

12

A That is correct.

13

Q You left the store with Mr. Fiffe. Where did you go again?

14

15

A Went to the Government car.

16

Q And what happened when you went to the Government car?

17

18

A Fiffe and I entered the car and I instructed Agent Borst to pay Fiffe \$2900.

19

20

Q Did he do so?

21

A Yes he did.

22

Q Then what happened then?

23

A Fiffe counted out the money.

24

Then he made a motion with his hand like he was dialing a telephone and he said, "Tomorrow?"

25

12

Abbott-direct

THE WITNESS: Yes.

THE COURT: All right.

Q After you entered the back of the store, what happened?

A I observed Mr. Vivas on the telephone. And after he completed the call he went out into the -- in the front part of the store. And the -- after a short period of time the unidentified gentleman left the store. So Mr. Fiffe, Blanco, myself and Bermudez were left in the store.

Q You say the store. Doyou mean the back room?

A The back room of the store, I mean. I asked Blanco who Bermudez was. Blanco spoke in Spanish to Bermudez and they had a conversation, Bermudez and Blanco. Blanco said to me, "You don't have to worry about anything. He is the boss. He's okay."

Q Blanco told you that Mr. Bermudez was the boss; is that right?

A That's what he said.

At this point Fiffe pointed to Bermudez and said, "Colombiano;" pointed to Blanco and said, "Puerto Rico;" and tapped himself and said, "Cubano."

Q Do you know what Colombiano means?

A Means he was a Colombian national.

(Continued next page.)

9 Abbott-direct

a half kilo.

Q Is this conversation in English or in Spanish?

A In English.

Q You don't speak Spanish, do you?

A Only a few words here and there.

Q Mr. Vivas responded to you in English or Spanish?

A He responded to me in English.

Q After you told Mr. Vivas that you only had an eighth, would you tell us again what he responded.

A Well, to step back a minute. First, I asked him how much for the half. He told me it was 12,000. Then I told him I didn't have that much. I only had enough for an eighth. I asked if I could have the eighth. He said, no, it's got to be the half.

I said, "Well, why does it have to be the half?"

He said, "I don't want to break up the package."

I said, "Well, it's already in two separate bags. It's already broken up."

He said, "Well, in that case, you can have a quarter for 6500."

I said, "I haven't got the money for a quarter right now. I have the money for an eighth right now. And I will take that much from you."

1 that that is the instruction.

3 2 I think we are ready now. Mr. Abbott, will you
3 3 please resume.

4 B A R R Y P A U L A B B O T T , called as a witness,
5 6 having been previously duly sworn by the Clerk of the
6 7 Court, resumed the stand and testified further as
7 8 follows:

8 DIRECT EXAMINATION

9 BY MR. KIMELMAN (continued):

10 Q Now, I believe, Agent Abbott, when you left off
11 12 yesterday you were about to describe a meeting you had with
12 Victor Blanco on the 23rd of November.

13 Now, could you tell us again did you meet with
14 Victor Blanco on November 23rd, 1973?

15 A Yes, I did.

16 Q Will you tell us where that meeting occurred?

17 A In Blanco's apartment.

18 Q Do you recall approximately the time of that
19 meeting?

20 A About twelve o'clock in the afternoon.

21 Q Did you have a conversation with Mr. Blanco?

22 A Yes, I did.

23 Q Will you tell the Court and jury what you said
24 to Mr. Blanco at that time?

25 A I asked Blanco if he had been able to get in touch

Abbott-direct

1
2 with Mr. Fiffe for the purpose of putting me together with
3 Mr. Bermudez again.

4 Mr. Blanco told me he couldn't contact Fiffe
5 because the store was closed for the Thanksgiving holiday.

6 I told Blanco there was no great hurry because
7 I still had not obtained enough money to purchase a half kilo
8 of cocaine. And I would contact him after the weekend.

9 MR. SUTTON: Your Honor, I rise respectfully to
10 ask if the witness could please try to make an effort
11 to speak a little louder. It is a little difficult
12 for me to hear him.

13 THE COURT: Well, try to do that.

14 BY MR. KIMELMAN:

15 Q Is that substantially the conversation that
16 you had with Mr. Victor Blanco that day?

17 A Yes, it is.

18 Q When is the next time you met with Victor Blanco

19 A I saw Mr. Blanco on November 26, 1973.

20 Q Where did that meeting occur?

21 A I went to Blanco's apartment.

22 Q That is at 97 Clinton Avenue, is that correct?

23 A That is correct.

24 Q Approximately what time was this meeting?

25 A Approximately 2:30 in the afternoon.

Abbott-cross

1
2 sorry, he is quite correct. I read "Vivas" and it is "Vegas."

3 My apologies, Mr. Kimelman. I am sorry. Your
4 Honor, it was not intentional:

5 "Accordingly plans were made for Special Agent
6 Abbott to purchase another eighth kilogram of cocaine
7 from Angel Ortiz --"

8 Is this also known as?

9 A It means alias.

10 Q -- (continuing) -- "Fiffe, in an attempt to
11 locate the stash and/or implicate Jose Vegas in these
12 transactions."

13 Is that a true and accurate reading of what
14 you said -- what you wrote in Government's Exhibit 3500-5?

15 A Yes, it is.

16 MR. SUTTON: No further questions.

17 THE COURT: Mr. Matarazzo?

18 MR. MATARAZZO: Yes, your Honor.

19 CROSS-EXAMINATION

20 BY MR. MATARAZZO:

21 Q Mr. Abbott, on October 31 you arranged with
22 Victor "Red" Blanco to purchase one ounce of cocaine -- that
23 is October 31, 1973; is that correct?

24 A Yes.

25 Q When you met with Mr. Blanco, was Mr. Vivas'

Abbott-cross

name brought up?

A No, sir.

Q I will take you to November 5, 1973, on which date you state that you purchased from Victor Blanco, known as Red, and John Doe, who later became known as Fiffe -- Fefil, fifty-two grams of what has been analyzed as cocaine for six hundred and seventy-five dollars; is that correct?

A Yes, sir.

MR. MATARAZZO: May I have the exhibits, please, the one for six hundred and seventy-five dollars?

(Document given to counsel.)

Q Is that the cocaine that you purchased from these two gentlemen for six hundred and seventy-five dollars?

THE COURT: That is an exhibit?

MR. MATARAZZO: That is an exhibit, Government's Exhibit 1.

A Yes, this is the exhibit.

Q Mr. Abbott, when you purchased this cocaine, was Mr. Vivas present?

A No, sir.

Q Was his name mentioned?

A No, sir.

Q Was his name mentioned before the purchase of this cocaine?

Abbott-cross

1

6

2

A No, sir.

3

Q Was it mentioned at any time for the purpose

4

of this -- of purchasing this cocaine?

5

A No, sir.

6

MR. MATARAZZO: Thank you.

7

Q I now take you to November 8th of 1973, where

8

you had a meeting with Fiffe and Victor Blanco, you said, at

9

293 Grant Street, at which time you either purchased or were

10

given twenty-three grams of what was analyzed by the

11

Government's chemist as cocaine -- this item, Government's

12

Exhibit 3, when you purchased or were given this -- withdrawn.

13

Were you given this as a sample for nothing?

14

A Correct.

15

Q You were given the sample by a Mr. Blanco and

16

Mr. Fiffe; is that correct?

17

A That's correct.

18

Q At this time, was Mr. Fiffe present?

19

A No, sir.

20

Q Was his name mentioned?

21

A No, sir.

22

23

(continued on next page)

24

Shapiro
T5amR2
notes
follows

25

Abbott - cross - Matarazzo

Q Was the name mentioned when you made arrangements to buy it?

A No, sir.

Q Was his name mentioned when it was being purchased?

A No, sir.

Q Was he referred to --

A No, sir --

Q May I please finish?

A I'm sorry.

Q Was he referred to in any of the conversations leading up to the purchase of this substance later identified and analyzed as cocaine?

A No, sir.

MR. MATARAZZO: Thank you.

Q Now, I am not trying to belabor the point, your Honor. One more question to that point.

Before November 20, 1973, at approximately 7:00 o'clock, had you ever seen visually that man (indicating)?

MR. MATARAZZO: Mr. Vivas, please stand.

THE COURT: For the record pointing to the defendant Vivas.

THE WITNESS: No, sir.

MR. MATARAZZO: I'm sorry.

3 Abbott - cross - Matarazzo

THE COURT: The record should show that you pointed to the defendant Vivas.

BY MR. MATARAZZO:

Q Mr. Abbott, have yu everheard his name mentioned

A No, sir.

Q Therefore, the first time you ever saw Mr. Vivas according to your prior testimony, was the evening of November 20, 1973, at a place called the Estrella Record Shop; is that correct?

A Yes, sir.

Q When you entered the shop, Mr. Abbott, did you notice -- if you had -- withdrawn.

When you entered the shop, when was the first time you saw Mr. Vivas?

A When I entered the back room.

Q When you entered the back room?

A That's correct.

Q Mr. Vias was in the back room when you entered the store?

A To the best of my memory, yes.

Q What was he doing?

A He was on the phone.

Q Was he talking English, Spanish, Greek, anything that you could recognize?

4 Abbott - cross - Matarazzo

A I didn't hear anything.

Q Then how do you know he was talking, sir, if you didn't hear anything?

A I said he was on the phone. He had the receiver in his hand.

Q He wasn't talking on the phone, he had a receiver in his hand?

A I said I didn't hear anything.

Q Did he put the phone back on the receiver at any time?

A Yes.

Q Where did he go from there?

A Behind the counter or the main part of the store.

Q Could you see the main counter from the back room?

A I could see part of it.

Q And the part you saw he was behind the counter?

A No, sir, I saw him enter to go behind the counter but I didn't see him standing behind the counter.

Q Did you see him negotiate any business with customers that may have come in off the street? Did you see him talk with anyone in front of the store?

A No, sir.

5 Abbott - cross - Matarazzo

Q Therefore you don't know what he was doing in the front of the store?

A No, sir.

Q How long did he stay in the front of the store before you saw him again?

A Maybe 15 or 20 minutes.

Q And during those 15 or 20 minutes were you alone in the back?

A No, sir.

Q In whose company were you?

A Mr. Blanco, Mr. Fiffe and Mr. Bermudez.

Q What were you discussing?

A At any particular time or --

Q At any time during those 15 minutes, what were you discussing?

A A possible future transaction. Also discussed the fact that the package had not yet arrived.

Q You were talking about a package of -- not surgar, you were talking about cocaine, weren't you?

A Yes, sir.

Q Mr. Vivas was in front of the store?

A At this point, yes.

MR. MATARAZZO: Thank you.

Q Mr. Abbott, I'm sorry to have to go back in

1 6
2 time, but you mentioned a telephone number that you
3 saw Mr. Fiffe call before you went to the Estrella Record
4 Shop, 657-1358.

5 Do you have any knowledge as to whose number
6 that is?

7 A Yes, sir.

8 Q Would you please tell me --

9 MR. SUTTON: Objection. No proper foundation
10 has been laid.

11 THE COURT: I will allow it. This is cross-
12 examination.

13 MR. MATARAZZO: Withdrawn.

14 Q 657-1358, is that the telephone number of the
15 Estrella Record Shop?

16 A No, sir.

17
18 (Continued on next page.)
19
20
21
22
23
24
25

HS/nc
5am3

CROSS-EXAMINATION

BY MR. MATARAZZO: (Cont.)

Q Are you sure?

MR. SUTTON: Objection.

THE COURT: Overruled, I will allow it.

A I know who the subscriber is and it's not the Estrella Record Store.

MR. SUTTON: Objection and move to strike.

THE COURT: I will allow it. Motion denied.

Q So that before you went to the Estrella Record Shop this telephone call was made and it's not the Estrella Record Shop?

MR. SUTTON: Objection, your Honor, as not properly based and founded in the record.

THE COURT: This is cross-examination. It's a lot different than direct examination. I will allow it.

MR. SUTTON: May I have a conference --

THE COURT: Sure, you can confer with Mr. Matarazzo over in the corner, outside the hearing of the jury. Over in the corner of the courtroom.

(Pause while counsel confer.)

THE COURT: Now wait. If you are going to do any talking it will be out of earshot of the jury.

Abbott- cross/Matarazzo

MR. MATARAZZO: The question will be withdrawn.

BY MR. MATARAZZO:

Q Now, before you went to the Estrella Record Shop, is it a fact that you, Mr. Fiffe and Mr. Blanco made arrangements to inspect cocaine?

A I was told by Mr. Blanco the package would be available for my inspection.

Q Sir, did I hear correctly today and yesterday that it was your impression that you were not going to buy cocaine, but you were going to inspect it?

A That was my impression, yes.

MR. MATARAZZO: Thank you.

If you will be patient a moment, please.

(Pause.)

BY MR. MATARAZZO:

Q Mr. Abbott, according to your testimony you asked someone in the back room, before you left, if you could have a blow for the man in the car who was waiting so long -- what's a blow?

A A blow is a small amount of cocaine that one would take -- I guess you would call it a dosage unit of cocaine.

Q In other words, one would take a sample of the

1 3
2 cocaine or a little bit, I suppose, if I am correct, if I am
3 not, please correct me -- place it in the palm of one hand
4 and sniff it -- is that a blow, sir?

5 A Yes, sir, it's enough to get high on.

6 MR. SUTTON: May I have a side bar?

7 THE COURT: The jury may be excused.

8 (Jury leaves courtroom.)

9 MR. SUTTON: Your Honor, I would ask if it
10 is possible that your Honor could give a limiting
11 instruction that we are not bound by the questions
12 that Mr. Matarazzo is putting --

13 THE COURT: What do you mean it's not
14 bound -- it's part of the record.

15 MR. SUTTON: It does not affect the defendant
16 Mr. Bermudez until --

17 THE COURT: I decline to give any such
18 instruction. Everything that comes into the case is
19 in the evidence and it may very well bind your client,
20 if he is a member of the conspiracy.

21 All these conversations, all the things
22 that occurred.

23 Now, Mr. Matarazzo has a right of cross-
24 examination for his client the same as your cross-
25 examination.

1 4
2 MR. MATARAZZO: May I have a conference --

3 THE COURT: You just can't object to a
4 question because you don't like it or it doesn't do
5 your client any good. When he wanted to prove to the
6 jury that the phone number was not his, he had a
7 perfect right to do it.

8 You think I will prevent him from showing
9 a phone number was not his client's --

10 MR. SUTTON: No, your Honor. I didn't want
11 it to be done in a way not appropriate as to my client.

12 THE COURT: If under the instruction
13 that I will give, it binds your client, it binds
14 your client.

15 MR. MATARAZZO: May we have a two-minute
16 conference?

17 THE COURT: Have a two-minute conference.
18 Let's get along. That's why we have separate counsel--
19 wait a minute, Mr. Matarazzo. I don't want to sit here
20 while you are having a conference.

21 Ask them to come in, please.

22 We will take our lunch hour and you can talk
23 to Mr. Sutton for an hour.

24 MR. SUTTON: Thank you, your Honor.

25 (Jury present.)

4a

Abbott- cross/Matarazzo

1
2 THE COURT: We will take out lunch hour at
3 this point and the case will continue at 1:30. That
4 is half past one.

5 You may step down.

6 (Witness leaves witness stand.)

7 (Luncheon recess taken.)
8
9
10
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AFTERNOON SESSION

(The following occurred in the absence of the jury.)

THE COURT: Mr. Matarazzo?

Seat the jury.

MR. SUTTON: Just a moment.

MR. MAHLER: On the question of the charge to the jury, I would just like a little advice perhaps. I would like your Honor to charge --

THE COURT: I won't take any requests this way. Write them out and submit them. Requests to charge must be submitted. They were supposed to be submitted by four o'clock today.

MR. MAHLER: I have just merely written out the request.

THE COURT: I will take it in writing in any way. Then it will be marked for identification and that's it. That is your version of what you want me to charge. I am not telling you what I think you ought to ask.

THE CLERK: So marked as Court's Exhibit 1.

(Document referred to was received and marked Court's Exhibit 1.)

MR. MAHLER: All I wanted to really ask you is whether you intend to charge concerning departmentalization of evidence concerning Diaz-Martinez as apart

DDS:jm
TlpmRl

1 from the other two defendants since he is only on the
2 one count --

2 3 THE COURT: I won't charge it that way. I am
4 not going to charge it that way. He may be the least
5 culpable or he may be the most culpable. That's up
6 to them.

7 MR. MAHLER: In reading the cases on severance,
8 while it seems to be in the Court's discretion not to
9 sever, it would appear from the cases that I had read
10 originally when I made my motion, that then there must
11 be some type of instruction --

12 THE COURT: You had better give me the charge
13 that you want me to give as to what you call
14 departmentalization.

15 Seat the jury.

16 MR. SUTTON: One more item --

17 THE COURT: I will seat the jury on the time
18 scheduled, morning and afternoon. Seat the jury.

19 MR. SUTTON: May I have a request, your Honor?

20 THE COURT: What is that?

21 MR. SUTTON: May I have leave to further cross-
22 examine? I had left out something that I should have
23 asked.

24 THE COURT: You may have all the time you want.

25 MR. SUTTON: Thank you.

1 MR. MAHLER: Can we have the 3500 material a
2 little more in advance?

3 THE COURT: I will not direct anything of that
4 nature. That's up to the United States Attorney.
5 He gave it to you before he had to give it to you when
6 he gave it to you.

7 MR. MAHLER: We just had Abbott's.

8 THE COURT: He's the only witness.

9 Seat the jury.

10 (The jury thereupon returned to the courtroom
11 at 1:35 o'clock p.m.)

12 B A R R Y P A U L A B B O T T , called as a witness, having
13 been previously duly sworn by the Clerk of the Court,
14 resumed the witness stand and testified further as
15 follows:

16 THE COURT: All right, Mr. Matarazzo, please
17 continue your examination.

18 MR. MATARAZZO: I beg your pardon, Judge?

19 THE COURT: Continue your examination.

20 MR. MATARAZZO: I thought counsel was going to
21 come back and examine.

22 THE COURT: When you get through, then I will
23 allow him to go ahead.

24 MR. MATARAZZO: Very well.
25

(continued on next page)

Abbott-cross/Matarazzo

CROSS-EXAMINATION

BY MR. MATARAZZO (continued):

Q Mr. Abbott, when you finally left the Estrella Record Shop on the evening of November 20th, did you leave alone?

A No.

Q In whose company did you leave the premises?

A I left with Mr. Blanco and Mr. Fiffe.

Q Did you also go into the car with your associate, Mr. Borst?

A Yes, I did.

Q And all four of you left?

A No, sir. Mr. Borst was not inside the store.

Q I am so sorry. I can't hear you.

A Mr. Borst was not in the store.

Q No, but you left -- I understand that -- but when you left, you left in an automobile in which you and Mr. Borst, Mr. Blanco and Mr. Fiffe were?

A No, sir.

Q Very well. Tell us who and how they left?

A Mr. Blanco and Mr. Fiffe and myself left the store. We walked together on the street. Then Mr. Blanco and Mr. Fiffe entered Mr. Fiffe's vehicle and I and Agent Borst entered the Government vehicle.

Abbott-cross/Matarazzo

5

1

2

Q And where did you go from there?

3

A Well, we went a short distance away and met

4

with Group Supervisor Seneca.

5

Q Did you return to the store at any time that

6

night?

7

A No, sir.

8

Q When you left the store, did Mr. Vivas come with

9

you at all, accompany you at all, out of the store with

10

Mr. Blanco and Mr. Fiffe?

11

A No, sir.

12

Q Touching upon the substance that you said you

13

saw in the back of the store, was it ever at any time, to

14

your knowledge, analysed?

15

A No, sir.

16

Q Now, on November 23rd, which is approximately

17

three days after you entered the Estrella Record Shop, you

18

met again with other people -- withdrawn -- did you meet with

19

anyone else on November 23rd of 1973 concerning the purchase

20

of any substances?

21

A Yes.

22

Q Whom did you meet with?

23

A Victor Blanco.

24

Q Anyone else?

25

A No, sir.

Abbott-cross/Matarazzo

1

2

Q Was Mr. Vivas there?

6

3

A No, sir.

4

Q Did Mr. Vivas' name come up?

5

A No, sir.

6

Q I now take you to April 3, 1974, almost five

7

months later, you had occasion to go to the Estrella Record

8

Store, is that correct, sir?

9

A Yes, sir.

10

Q When you went to the store, Mr. Vivas was there?

11

A Yes, sir.

12

Q Anyone else in the store?

13

A Yes, sir.

14

Q Who?

15

A Mrs. Vivas.

16

Q Were any of the other men whose names you have

17

uttered or given in this court in the store at the time?

18

A No, sir.

19

Q Did there names come up?

20

A Yes, sir.

21

Q Who mentioned them?

22

A I did.

23

Q Did Mr. Vivas ever mention their names?

24

A No, sir.

25

Q Did the same thing happen on April 5, more or

Abbott-cross/Matarazzo

7 2 less?

3 A Yes, sir.

4 Q Mr. Abbott, I ask you to try to refresh your
5 recollection. You said you went to the store twice after
6 November 20th, 1973. You purchased no substance, did you?

7 A No, sir.

8 Q Did you purchase any substance from Mr. Vivas?

9 A No, sir.

10 Q Was any shown you?

11 A No.

12 Q Now, if you refresh your recollection for a
13 moment, did you not go back a third time?

14 A Yes, sir, I did.

15 Q And on the third time did you purchase any
16 substance?

17 A No, sir.

18 Q Was any shown you?

19 A No, sir.

20 Q Mr. Abbott, I have another question for you,
21 after the arrest of Mr. Vivas did you go to his home?

22 MR. KIMELMAN: Your Honor, I am going to object
23 to this as beyond the scope of my direct examination.

24 THE COURT: That is not the test.

25 The jury may be excused.

1 search warrant, the evidence which was seized, part
2 of the evidence which was seized by the Government,
3 it intends to offer at this trial.

4 THE COURT: Whose premises were searched?

5 MR. KIMELMAN: Premises of the defendant Jorge
6 Vivas.

7 THE COURT: Who represents Vivas?

8 MR. MATARAZZO: I do. I'm going to make the
9 motion to suppress on the following grounds:

10 Number 1, it is totally different matter, has
11 nothing to do with this case, and is highly
12 prejudicial, once presented to a jury.

13 THE COURT: When did you first learn of the
14 seizure?

15 MR. MATARAZZO: When? Two months ago.

16 THE COURT: Why didn't you make the motion
17 before?

18 MR. MATARAZZO: Because I had no knowledge
19 they were going to present it in this case. It is
20 a totally different case, totally different arrest
21 before this sealed indictment. It has nothing to do
22 with this case, absolutely nothing to do with this
23 conspiracy case.

24 THE COURT: What was seized?

25 MR. KIMELMAN: Your Honor, Mr. Vivas is

1 charged as a result of that seizure, with possession
2 of marijuana. The Government does not intend to
3 introduce the marijuana seized on that occasion
4 against Mr. Vivas, but there was also a scale with
5 traces of cocaine and other paraphernalia that could
6 be used in the cocaine business, which is the object
7 of this conspiracy which the Government does intend
8 to use against Mr. Vivas.

9 THE COURT: What do you say is wrong with the
10 seizure?

11 MR. MATARAZZO: There is nothing wrong with
12 the seizure. I say it is a different case.

13 THE COURT: You are talking about relevancy?

14 MR. MATARAZZO: Not only is it not relevant,
15 it is so highly prejudicial, that I will inform the
16 Court now that I will move for a mistrial. It has
17 nothing to do with this case. All the Government is
18 attempting to do is to window-dress their conspiracy
19 case with a seizure of marijuana and other articles.

20 MR. SUTTON: It would be the kind of circum-
21 stantial evidence --

22 THE COURT :We are not talking about an unlawful
23 seizure, we are talking about relevancy, aren't we?

24 MR. KIMELMAN: I believe Mr. Matarazzo is
25 talking about prejudice.

1 MR. MATARAZZO: Together with relevancy.

2 THE COURT: It is only irrelevant evidence
3 that is prejudicial that we have to be concerned
4 about.

5 MR. KIMELMAN: The Government would offer
6 this evidence as similar acts and to show the motive
7 of the individuals involved, that they were partici-
8 pating in a cocaine conspiracy.

9 THE COURT: When was the seizure made?

10 MR. KIMELMAN: June 14, your Honor.

11 MR. MAHLER: Then I would have to join in,
12 too. I have never been given any notice that there
13 was another warrant in the case.

14 MR. KIMELMAN: That is not true. Last time
15 all the lawyers were before the Court I informed all
16 the lawyers of the other warrant.

17 THE COURT: June 14th, when?

18 MR. KIMELMAN: 1974.

19 THE COURT: So it was after the indictment.

20 Even if it is admissible, I would have to say
21 that it is chargeable against only the defendant
22 Vivas.

23 MR. KIMELMAN: That is correct, your Honor.

24 THE COURT: At this point I don't know whether
25 it is admissible. I have to hear the case unfold.

1 Have you read United States Against Deaton?

2 MR. MATARAZZO: I did not look it up, sir.

3 THE COURT: Our circuit is very liberal in
4 submitting evidence of prior or subsequent acts and
5 Deaton indicates the distinction between the rule in
6 this circuit and in other circuits.

7 MR. SUTTON: Wouldn't that be limited, your
8 Honor, to specific --

9 THE COURT: In other circuits, the Government
10 must show that it is not introduced solely to show
11 the bad character or criminal disposition of the
12 defendant.

13 In this circuit it is the other position, it
14 is introducible unless it is designed solely for that
15 purpose.

16 So that I am going to await the development
17 of the case and I direct the Government not to offer
18 it without alerting me to the fact that it is ready
19 to offer it, and we will argue it at that point.

20 MR. MATARAZZO: May I make the following point
21 before I leave the subject?

22 This seizure was before the release of the
23 sealed indictment. It was one week before. I don't
24 know when the indictment actually took place, but I
25 still, -- I maintain once more --

1 THE COURT: It was filed May 30th.

2 MR. MATARAZZO: The indictment?

3 THE COURT: Yes.

4 MR. MATARAZZO: But there was no action on the
5 indictment as far as the defendant was concerned until
6 afterwards.

7 THE COURT: I am just telling you when it was
8 filed. It is an act subsequent to the filing of the
9 indictment.

10 The Government charges that the indictment
11 terminated on or about --

12 MR. MATARAZZO: May I also point out that
13 nowhere in the affidavits permitting this warrant is
14 there a referral to the indictment.

15 This warrant was issued on its own merits,
16 nothing to do with this indictment, and to introduce
17 it as evidence in this case, I maintain most
18 vehemently, is highly prejudicial, because they are
19 window-dressing and painting the defendant --

20 THE COURT: Mr. Matarazzo, I predict that
21 most of the Government's evidence, admissible evidence,
22 will prejudice the defendants. It certainly won't
23 help them.

24 The only question is whether it is relevant
25 to an issue in the case. To talk about prejudicial
testimony, really is not an argument.

1 MR. MATARAZZO: May I ask one question?

2 Am I to understand that if this case involving
3 the marijuana and a scale has nothing to do with the
4 alleged conspiracy, and cannot be tied up --

5 THE COURT: They say they are going to
6 introduce evidence that he dealt in cocaine.

7 MR. KIMELMAN: That is correct.

8 THE COURT: They are not going to introduce the
9 marijuana, they are going to introduce a scale that
10 showed traces --

11 MR. KIMELMAN: We will not introduce the
12 marijuana seized.

13 THE COURT: That showed traces of cocaine on the
14 scale, to show that he dealt in cocaine.

15 MR. SUTTON: Your Honor has ruled that it will
16 not be introduced until at least we have had another
17 opportunity to view it again.

18 THE COURT: In other words, under Deaton, to
19 balance the -- what you call prejudice, and the
20 Court uses that term, as I recall it, in the case
21 against the defendant, the relevancy, and whether it
22 is on an issue in the case, whether it will, in
23 effect, show that the defendant knowingly intended --
24 intentionally entered this conspiracy. If it is not
25 at all related to the issues in the case, then I

1
2 objection --

3 MR. SUTTON: May we participate or are we
4 left out altogether? Are we participating here?
5 Do we have rights to cross-examine on anything?

6 THE COURT: I'll give them to --

7 THE COURT CLERK: Government's Exhibit 14,
8 previously marked for identification, now marked in
9 evidence.

10 (So marked.)

11 Q Special Agent Greenan, I show you what has
12 been marked as Government's Exhibit 15 for identification
13 and I ask you if you recognize that object.

14 A Yes, I do.

15 Q And was that seized by you on June 14, 1974?

16 A That's correct.

17 Q Would you tell us where you received that item?

18 A I seized it in the residence of Mr. Vivas. The exhibit
19 was seized from a cabinet which is located in a dining room
20 in the main area of the residence.

21 Q And, sir, can you tell us what Government's
22 Exhibit 15 for identification is?

23 A It's two containers; one with a lid on it. It con-
24 tains what to me at the time was a white unknown substance,
25 which was later found by the lab to be a powder containing

xxx

borates.

Q Based on your experience and training, do you know what use is made of borates?

A Yes.

MR. MATARAZZO: Objection.

THE COURT: Overruled. I'll allow it.

A Yes. Borates or boric acid is used to dilute the cocaine; cut it up. Make one volume a bigger volume.

Q Sir, after you received Government's Exhibit 15 for identification, what did you do with it?

A I brought it into the kitchen area.

Q And did you follow the same procedure with Government's Exhibit 15 as with Government's Exhibits 13 and 14?

A Yes, I did.

Q And is it your testimony that like the two preceding exhibits, you picked it up in the same manner and brought it to the court here today in the same manner?

A That's correct.

MR. KIMELMAN: I'll offer this in evidence, your Honor, Government's Exhibit --

THE COURT: Same objection?

MR. MATARAZZO: Same objection to each and every article offered in evidence.

1
2 Q Was it together with the other items that you
3 have testified to? The previous Government exhibits in
4 evidence.

5 A Yes, it was.

6 Q Now, sir, may I ask you if you know what
7 Government Exhibit 17 is.

8 A This is a heat sealer. You put it in and it heats
9 up. And at one end you're able to slip in an open plastic
10 bag or similar material and press it down and it will melt
11 together and form a leak-proof seal.

12 Q Now, sir, based on your training and experience,
13 is it your opinion that Government Exhibit 17 for identifica-
14 tion is used in the cocaine business?

15 A Yes, it is.

16 MR. KIMELMAN: Your Honor, I ask that Govern-
17 ment Exhibit 17 be admitted. Well, if I may, your
18 Honor --

19 Q Did you follow the same procedure for Govern-
20 ment Exhibit 17 for identification as you did with the other
21 Government exhibits in evidence?

22 A The only different procedure is that it's left in
23 the night deposit vault. I did take it out on the 17th of
24 June to type up what we call a BEA form 7A, which is a
25 chain of custody for narcotic evidence and then returned it

4 Greenan-direct

A That is correct.

Q Did you follow the same procedure with these exhibits as you did with Government's Exhibit 18 and 17?

A Yes.

Q Could you tell us what Government's Exhibits 19 through 19E are?

A They are six plastic containers marked Lactose and they are still factory sealed.

Q Based on your training and experience would you tell us what the purpose of Lactose is in a cocaine operation?

A Lactose is the same as boric acid, a dilluting or cutting material for the cocaine.

MR. KENTLMAN: I have no further questions.

THE COURT: Mr. Matarazzo would you like to cross-examine first?

MR. KENTLMAN: If I may I would like to offer Government's Exhibit 19 thorough 19E in evidence.

MR. MATARAZZO: Same objection.

THE COURT: Overruled. They may be marked.

THE CLERK: Government's Exhibits 19 through 19E previously marked for identification now marked in evidence.

MR. HANLER: May it be cleared or clarified

1 5 Greenan-direct
2 as to whom these are being offered?

3 THE COURT: Would you like re to say it again?

4 MR. MAHLER: I wasn't too clear on it the
5 first time.

6 THE COURT: If the testimony is credited, it
7 is against only defendant Vivas, and of course that
8 is also true as to the exhibits.

9 Is that satisfactory?

10 MR. MAHLER: Yes.

11 CROSS-EXAMINATION

12 BY MR. MATARAZZO:

13 Q Mr. Greenan, do you know the nature of the
14 charges against this defendant here in this court?

15 A I believe it is a conspiracy to violate the
16 Federal Narcotics Law.

17 Q A conspiracy; is that right?

18 A Yes.

19 Q Did you arrest this defendant?

20 A Yes.

21 Q On what charges?

22 MR. KINELMAN: Objection.

23 THE COURT: Sustained.

24 Q Did you arrest him for the possession of
25 these articles?

Greenan-cross/Matarazzo

MR. KIMELMAN: Objection.

THE COURT: Sustained.

Q Is this man now facing charges in this court
for possession of these articles?

THE COURT: Objection sustained.

The jury will disregard the question too. It
is totally irrelevant.

(Cont'd on next page.)

Greenan-cross/Matarazzo

1
2 Q Were you at a bail hearing where the defendant
3 was arraigned?
4

5 MR. KIMELMAN: Objection.

6 THE COURT: Objection sustained.

7 Now, if you continue this I will excuse the jury
8 and I will take an offer of proof.

9 MR. MATARAZZO: You will take a what?

10 THE COURT: I will take an offer of proof
11 outside of the hearing of the jury.

12 MR. MATARAZZO; I would like that.

13 THE COURT: The jury is excused.

14 (The jury thereupon retired from the courtroom.)

15 (The following occurred in the absence of the jury.)

16 MR. MATARAZZO: Your Honor, I now maintain by
17 your Honor's refusal to have me advise the jury that
18 this man is already facing charges for the possession
19 of these articles, and my client is being further
20 prejudiced, and the error is being compounded, and he
21 cannot receive a fair trial here if he is being
22 charged and the exhibits on which he is being charged
23 in another crime are being shown to the jury.

24 THE COURT: Tell me what you expect to bring
25 out by your examination of this witness.

MR. MATARAZZO: The same thing that the

DS:BD

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Greenan-cross/Natarazzo

assistant attorney is bringing out in reverse. He is trying to bring forth my client must be a drug dealer in a conspiracy of A, B, C and D because he has lactose, a heat sealer, a scale and traces of cocaine. And I am saying it has nothing to do with the conspiracy. He was arrested on this charge which is a separate charge and not pending before this Court, and to bring into this Court before this jury is highly prejudicial, and collateral, and immaterial.

THE COURT: Denied. What you are doing is you want to bring in the charges before the jury.

MR. NATARAZZO: I would like the jury to know that he is being held with this in this Court under a different charge.

THE COURT: Is there anything else you want to ask this witness?

MR. NATARAZZO: Later, yes.

THE COURT: I mean about the other charge.

MR. NATARAZZO: Whether he was present at the arraignment. Whether he caused his arrest. Whether he saw the defendant or placed him on bail on this specific charge having nothing to do with this charge.

MR. KUTZMAN: Your Honor, if I may --

THE COURT: I will sustain objection to all that

Greenan-cross/Matarazzo

line of questioning.

MR. MATARAZZO: Why doesn't your Honor let me ask the question?

THE COURT: If it is irrelevant I won't permit it to come before the jury.

MR. MATARAZZO: But your Honor passed on the relevancy of translations but it got to the jury. Let me do the same thing. Let me bring it to the jury.

THE COURT: On irrelevancies?

MR. MATARAZZO: For two days I listened -- and I better Spanish than any person in this room including the people of Spanish origin -- listened to things getting to that jury that have no right to get to that jury. It got to them and your Honor said you will please eliminate that. Forget it. It doesn't exist. May I have the same privilege?

THE COURT: No.

MR. MATARAZZO: I didn't think so, your Honor.

THE COURT: Your request is obviously improper.

MR. MATARAZZO: I don't think so. And I say this with respect, your Honor, and with nothing else but respect.

THE COURT: Anytime anyone prefaces his remarks by that I expect anything to happen.

Greenan-cross/Matarazzo

1
2 MR. MATARAZZO: Your Honor has had much more
3 experience in the courtroom than I have.

4 MR. KIMELMAN: If I may, Mr. Vivas also was
5 arrested for --

6 THE COURT: For a gun charge. You want to
7 bring that out?

8 MR. KIMELMAN: For possession of marijuana.
9 He was also seen by this agent --

10 MR. MATARAZZO: It had better go in. You have
11 let in everything but the kitchen sink.

12 MR. KIMELSON: Sir, may I finish one statement
13 in this courtroom?

14 He was also observed by this agent fleeing from
15 the house and throwing marijuana over a fence. If we
16 are going to go into collateral matters I will offer
17 that as well.

18 MR. MATARAZZO: As far as proving that he had
19 marijuana in his possession is another story, not in
20 this Court. It is highly prejudicial. That man
21 doesn't stand a chance of tomorrow coming yesterday.

22 THE COURT: You keep saying that and what you are
23 saying is that the proof is so overwhelming that the
24 jury will convict him. Well, I can't help that.

25 MR. MATARAZZO: No, Judge, I never said that.

Greenan-cross/Matarazzo

1
2 All I am saying is this man is facing in this Court
3 separate and distinct charges for the possession of
4 each one of these articles. This Court and this
5 assistant U.S. attorney are making it look as if it is
6 proof of a conspiracy which has nothing at all to do
7 with this.

8 THE COURT: Well, I disagree with you. I agree
9 with the assistant United States attorney. The only
10 other body that will pass on that, if he is convicted,
11 is that the Court of Appeals will pass on it and you
12 will hear from them. And if they agree with me you may
13 then believe it. But no matter how many times I say
14 it and try to explain it, it doesn't seem to get
15 through. I made my ruling. You have got your excep-
16 tion on the record. It's clear and that is all. If I
17 am wrong there will be a reversal. And you will be
18 back before another judge, that's all.

19 Go ahead and seat the jury.

20 (The jury thereupon returned to the courtroom
21 at 5:17 P.M. o'clock.)

22 JAMES GREENAN, called as a witness, having
23 previously been duly sworn, resumed the stand and
24 testified further as follows:
25

1
2 A Yes, I am.

3 Q Now, Special Agent Greenan, I draw your attention
4 to the 14th of June of this year. Did you execute a search
5 warrant on that day?

6 A Yes.

7 Q Could you tell us --

8 MR. MATARAZZO: If your Honor please, at this
9 point I most respectfully object to the further line of
10 questioning of this witness. Because the events which
11 took place on June 14, 1974, are collateral and had
12 nothing to do with either the indictment or the charges
13 before this Court. They are collateral and prejudicial
14 to my client.

15 THE COURT: The objection is overruled.

16 MR. MATARAZZO: Thank you, your Honor.

17 THE COURT: I would instruct the jury that the
18 testimony given by or to be given by Special Agent
19 Greenan, if you credit it is only chargeable against
20 the defendant Jorge Vivas.

21 I've ruled as a matter of law that the conspiracy
22 had expired by this time June 14, 1964 -- '74. Do you
23 understand the theory upon which others are chargeable
24 with acts of declarations, outside the presence of the
25 accused are on the theory that they're partners in the

EJP:SK:lag

United States District Court

FOR THE

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Docket No.

Case No.

VS.

PREMISES KNOWN AND DESCRIBED
AS 943 BELMONT AVENUE, BROOK-
LYN, NEW YORK, a two story,
one family red brick dwelling.

SEARCH WARRANT

To ANY SPECIAL AGENT OF THE DRUG ENFORCEMENT ADMINISTRATION

Affidavit(s) having been made before me by JAMES GREENMAN, Special Agent
of the Drug Enforcement Administration
that he has reason to believe that { on the person of;
on the premises known as }

943 BELMONT AVENUE, BROOKLYN, NEW YORK, a two story, one family
red brick dwelling

in the Eastern District of New York

there is now being concealed certain property, namely a quantity of cocaine, a

Schedule I narcotic drug, controlled substance, in violation of
Title 21, United States Code, Section 841(a)

and as I am satisfied that there is probable cause to believe that the property so described is being
concealed on the person or premises above described and that grounds for application for issuance of the
search warrant exist as stated in the supporting affidavit(s).

You are hereby commanded to search within a period of _____
(not to exceed 10 days) the person or place named for the property specified, serving this warrant
and making the search { ~~in the daytime (6:00 A.M. to 11:00 P.M.)~~
at any time in the day or night* } and if the property be found
there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written
inventory of the property seized and promptly return this warrant and bring the property before
_____ as required by law.

Federal judge or magistrate

Dated this 14th day of June

, 1974.

U.S. MAGISTRATE

VINCENNA, INDIANA

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Judge (Federal or State Court of Record) or Federal Magistrate

*The Federal Rules of Criminal Procedure provide: "The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime." (Rule 41(c)). A statement of grounds for reasonable cause should be made in the affidavit(s) if a search is to be authorized "at any time day or night" pursuant to Rule 41(c).

RETURN

I received the attached search warrant June 14, 19 74, and have executed it as follows:

On June 14, 19 74 at 4 o'clock A M, I searched the person or premises described in the warrant and

I left a copy of the warrant with CARMEN ESTRELLA
name of person searched or owner or "at the place of search"

together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

1,000 capsules of antibiotics
6 1 lb jars of lactose
1 .38 colt revolver (loaded six rounds)
1/2 lb marijuana
20 rounds .38 special ammo
15 rounds .38 special
38 special cartridge pistol
50 rounds 22 short ammo
1 heat sealer
1 scale # 6040
1 cellophane containing cocaine leaves
17 special capsules (doughnut shape)

This inventory was made in the presence of Asst. Santa Barre

and Sgt. Richard Bell

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

James Greenman

Subscribed and sworn to and returned before me this _____ day of _____, 19 _____.

Federal Magistrate